Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

1997 Term

ALLEN E. ERTEL,

Petitioner

v.

THE PATRIOT-NEWS COMPANY,
DICK SARGE and
WILLIAM C. COSTOPOULOS,

Respondents

**PETITION FOR A WRIT OF CERTIORARI
AND APPENDIX TO THE
PENNSYLVANIA SUPREME COURT**

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QUESTIONS PRESENTED

I. Is the case of Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990) the law of the United States of America?

A. Can the Milkovich case and its holdings be evaded by the declaration of a state's supreme court that because no single statement in an article can be proved false, therefore, the article as a whole is incapable of being defamatory?

II. May a state's supreme court reinterpret its summary judgment rule clearly expressed and so held by its previous cases to evade the holdings of the case of Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990) consistent with due process, procedural and substantive equal protection of the laws?

III. Is there evidence in the case at bar that respondent, Costopoulos, procured publication of the article in

question?

IV. Assuming Certiorari is granted, should the Court decide the questions raised in the court below respecting all questions, but in particular, the questions of actual malice and opinion.

PARTIES TO THE PROCEEDING

Respondents and Petitioner are named in the caption of this case. There are no other parties to this case. The parent company of respondent, The Patriot-News Company is Newhouse Publications.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Statement of the Case

A. Statement of Jurisdiction in the Court of First Instance .. 3

B. The Facts 3

Summary of Argument 6

Argument 11

I. THE BALD ASSERTION BY THE PENNSYLVANIA SUPREME COURT THAT THERE IS NO EVIDENCE OF FALSITY INT HE ACCUSATION OF FABRICATION AND TAMPERING OF EVIDENCE ON THE PART OF APPELLANT MEANS THAT THE LAW SET FORTH IN THE CASE OF MILKOVICH V. LORAIN JOURNAL CO. 110 S.CT. 2695 (1990) WILL BE EVADED UNLESS CERTIORARI IS GRANTED AND THE FINDING REVERSED. IN ADDITION, AS A RESULT OF THE NON-GRANT OF CERTIORARI, APPELLANT WILL BE DEPRIVED OF HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND HIS RIGHTS TO EQUAL PROTECTION OF THE LAWS 11

II. COSTOPOULOS PROCURED THE PUBLICATION OF THIS ARTICLE BY INDICATING TO APPELLEE SARGE THAT HE DID NOT CARE WHETHER SARGE PUBLISHED THE SAME AND THEREAFTER COMPLIMENTING SARGE ON THE PUBLICATION OF THE SAME 12

III. THE COURT SHOULD ADDRESS THE ISSUES PRESENTED IN THE COURTS BELOW RESPECTING AT LEAST ACTUAL MALICE AND OPINIONS, INASMUCH AS REMANDING THESE ISSUES TO THE PENNSYLVANIA SUPREME COURT COULD RESULT IN INTERMINABLE DELAY IN THIS MATTER IN BRINGING THIS CASE TO A CONCLUSION 12-13

TABLE OF AUTHORITIES

Page

CASES

Milkovich v. Lorain Journal Co.,
110 S.Ct. 2695 (1990) 6-7, 8, 11

New York Times v. Sullivan,
376 U.S. 254, 84 Supreme Court
710, 11 L.Ed.2d 686 (1964) 4

STATUTES

18 Pa. C.S.A. 4910 12

42 Pa.C.S.A. §§ 931 and 952 3

No.

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PETITION FOR A WRIT OF CERTIORARI
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PENNSYLVANIA SUPREME COURT

Petitioner, Allen E. Ertel, an individual, respectfully petitions for a Writ of Certiorari to review the Judgment and Opinion of the Pennsylvania Supreme Court.

OPINIONS BELOW

The Opinion of the Court of Common Pleas (Appendix A, infra) is not reported. The Opinion of the Superior Court of

Pennsylvania (Appendix B, infra) is also unreported. The Opinion of the Supreme Court of Pennsylvania (Appendix C., infra) is reported in ____ Pa. ____, 674 A2d 1038 (1996). The Pennsylvania Supreme Court on application for reargument denied the same without opinion on June 26, 1996.

JURISDICTION

(1) CONSTITUTIONAL PROVISION INVOLVED

Amendment 14 §1. Citizens of the United States. All persons born or naturalizing.... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within his jurisdiction the equal protection of the laws.

(2) PENNSYLVANIA RULE OF CIVIL PROCEDURE N.35 (SET FORTH AT LENGTH IN APPENDIX

G)

(3) THE FEDERAL QUESTION OF ACTUAL MALICE

The federal question of whether the evidence in this case presents a jury question on the issue of actual malice.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the Court of Common Pleas of Philadelphia County pursuant to Pennsylvania Statute 42 Pa.C.S.A. §§ 931 and 952.

B. THE FACTS

(i) The Constitutional provision in this case became relevant upon the decision of the Supreme Court of Pennsylvania of April 17, 1996. This provision applies to questions I and II presented in this case.

(ii) Questions III and IV presented involve federal questions concerning the

law of defamation and the burden of proof enunciated in the case of New York Times v. Sullivan, 376 U.S. 254, 84 Supreme Court 710, 11 L.Ed.2d 686 (1964).

The facts of this case are set forth in Appendix B, the Opinion of the Superior Court, on Pages 3b (first full paragraph) through 28b. The article in question is set forth in full in the dissenting Opinion of the Pennsylvania Superior Court in Appendix B, Pages 92b through 101b. The apology is set forth, verbatim, in the record before the Pennsylvania Supreme Court, R370a. The references are incorporated herein by reference.

In addition, the evidence of falsity presented to the Court of Common Pleas originally in this matter in opposition to the Motions for Summary Judgment by the Appellees, which were included in the Brief of Appellant in Opposition to the

Motions for Summary Judgment are set forth in record before the Supreme Court of Pennsylvania beginning at R564a (before the Pennsylvania Supreme Court)[1]

The Appellees' only argument with regard to falsity was the claim that no single sentence of the article itself was false. However, Plaintiff's claim was that the article, as a whole, implied that Appellant Ertel had fabricated and tampered with evidence, which are crimes in Pennsylvania. See Plaintiff's Complaint in the Supreme Court of Pennsylvania (R23a-R24a, Paragraph 11). The facts in this Complaint were sworn to, under oath, by Appellant Ertel in the

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[1] The first fourteen (14) pages of this Brief, including the Motion cover sheet indicating that the document was filed on December 9, 1988, were omitted by inadvertence in the copying of the record and are included in Appendix F of this Petition. The Brief in Opposition to the Motion for Summary Judgment also contain the Affidavit of Allen E. Ertel, set forth in full, at R573a through R579a, inclusive, of the record before the Supreme Court of Pennsylvania.

Complaint, our record in the Supreme Court of Pennsylvania (R26a). It is interesting to note that no where in the record was this argument responded to by the Appellees. The argument that the article was false as a whole was not made either in the Court of Common Pleas, the Superior Court, or the Supreme Court of Pennsylvania.

In addition to the evidence of falsity, heretofore set forth in this statement of facts, Appellant filed in his Motion for Reargument, a statement showing the falsity of the article in his Petition for Reargument, details which are set forth in Appendix E, Pages 1e through 10e, inclusive.

SUMMARY OF ARGUMENT

The Supreme Court of the United States in the case of Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990) held, in addition to single statements in

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a published article, that the article read as a whole could by implication defame a person (110 S.Ct. 2695 at 2707). In the case at bar, the implied accusation that Appellant fabricated and tampered with evidence is factually provable as false by the various documents including the Complaint, the Affidavit of Allen Ertel, the Admissions by the Patriot-News Company in their apology to Allen Ertel and all of the other matters set forth in and appended to the Brief in Opposition to Summary Judgment in the Court of Common Pleas and on Petition for Reargument in the Supreme Court (the items of falsity were also set forth in Appellant's Brief before the Superior Court).

Accusation of the commission of a crime is one of the basic matters which has long been the basis for a defamation action. The commission of the crime being denied by Appellant, under oath, in

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this case is evidence in itself of the falsity of the accusation. No response to the evidence presented was argued or set forth at any time by the Appellees with respect to the article as a whole implying the commission of the crimes by Appellant Ertel.

The Pennsylvania Supreme Court, without analysis, simply stated baldly that there was no evidence of falsity in this case. This is a matter which has traditionally been decided by the Supreme Court of the United States and the Supreme Court of Pennsylvania, in apparently adopting the argument made by th[redacted] Superior Court [redacted] although [redacted]

Thus, if the Supreme Court of Pennsylvania can evade the holding of the Milkovich case simply by baldly asserting that there is no evidence of falsity,

Appellant will be deprived of his day in court in violation of both procedural and substantive due process.

The due process arguments apply equally to the provisions of the state summary judgment rule of court applicable at the time, Appendix G, which itself flatly states that the moving party must show there is no issue of material fact before the court may enter summary judgment. To hold otherwise, flies directly in the face of the rule of court as it is written. Applying that to the case at bar by reinterpreting the rule to mean something that it directly states as otherwise, amounts to a deprivation of Appellant of his substantive and procedural due process rights.

The evidence that Costopoulos procured the publication of the article in question is set forth in the Opinion of the Superior Court at Pages 82b-83b.

Briefs of Appellant in the Superior and Supreme Courts set forth the basis for Costopoulos' procurement of the publication of the article.

Finally, the Court should address the other questions argued to the Pennsylvania Supreme Court, but not decided by it.

This case has now gone on in excess of ten (10) years and the sheer length of this case, if it now proceeds to a remand to the Pennsylvania Supreme Court for decision on another point argued, would, if the holdings are against the Appellant in each case, protract this legal action for decades to come. It gets to a point where one is reminded of the case of Jarndes v. Jarndes set forth by Charles Dickens in his novel **Bleak House**. If the case can go on, in effect, forever, then Appellant Ertel cannot obtain justice or a resolution of the case except by aban-

doning the same. This, too, involves the deprivation of Appellant's substantive and procedural due process rights and the equal protection of the laws for Appellant.

ARGUMENT

I. THE BALD ASSERTION BY THE PENNSYLVANIA SUPREME COURT THAT THERE IS NO EVIDENCE OF FALSITY IN THE ACCUSATION OF FABRICATION AND TAMPERING OF EVIDENCE ON THE PART OF APPELLANT MEANS THAT THE LAW SET FORTH IN THE CASE OF MILKOVICH V. LORAIN JOURNAL CO., 110 S.CT. 2695 (1990) WILL BE EVADED UNLESS CERTIORARI IS GRANTED AND THE FINDING REVERSED. IN ADDITION, AS A RESULT OF THE NON-GRANT OF CERTIORARI, APPELLANT WILL BE DEPRIVED OF HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND HIS RIGHTS TO EQUAL PROTECTION OF THE LAWS.

The Milkovich case, itself, is

authority that an article may implicitly accuse a person of a crime, and such, has never been held by the Supreme Court of the United States to deprive a person of the right to bring a defamation suit and succeed in this same through an action for damages.

II. COSTOPOULOS PROCURED THE PUBLICATION OF THIS ARTICLE BY INDICATING TO APPELLEE SARGE THAT HE DID NOT CARE WHETHER SARGE PUBLISHED THE SAME AND THEREAFTER COMPLIMENTING SARGE ON THE PUBLICATION OF THE SAME.

The article in the case at bar was prepared for Joseph Hubbard for a fee of $2,500.00. The article, as written, clearly implies that Appellant Ertel fabricated and tampered with evidence, both of which are crimes in Pennsylvania. See 18 Pa.C.S.A. 4910.

III. THE COURT SHOULD ADDRESS THE ISSUES PRESENTED IN THE COURTS BELOW

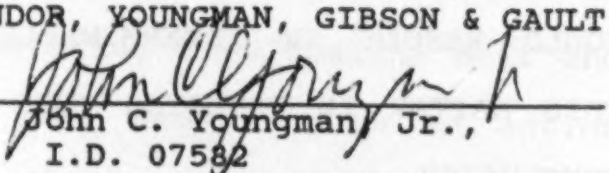
RESPECTING AT LEAST ACTUAL MALICE AND OPINIONS, INASMUCH AS REMANDING THESE ISSUES TO THE PENNSYLVANIA SUPREME COURT COULD RESULT IN INTERMINABLE DELAY IN THIS MATTER IN BRINGING THIS CASE TO A CONCLUSION.

The failure to obtain an ending to the defamation cases in today's world is itself an indication that the due process rights of defamees are being violated by the sheer length of time it takes to process one of these cases. Inasmuch as this Court is the final arbiter of whether actual malice has been proved in connection with a summary judgment motion, Appellant requests your court to make that decision now based on the facts

as presented in the appeal in this matter.

Respectfully submitted,

CANDOR, YOUNGMAN, GIBSON & GAULT

By 

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

ALLEN E. ERTEL	:	
	:	September Term,
v.	:	1985
	:	
THE PATRIOT NEWS COMPANY, DICK SARGE and WILLIAM E. COSTOPOULOS	:	No. 2145

OPINION

GAFNI, J. Date: May 10, 1991

Plaintiff Allen E. Ertel (Ertel) filed suit against Defendants, The Patriot News Company, Dick Sarge, and William E. Costopoulos for allegedly defaming Ertel in a newspaper article. Defendants move for summary judgment. For the following reasons, the motions for summary judgment are granted.

FACTS

1. In March, 1974, after a full trial on the merits, Kim Hubbard was convicted of murdering a twelve year old girl, Jennifer Hill. The trial was held in Lycoming County and Ertel was the

prosecuting attorney.

2. Defendant Sarge is a reporter and writes articles for the Sunday Patriot News, The Patriot and The Evening News, all published by defendant, The Patriot News Company.

3. In 1974, Sarge wrote, and The Patriot News published, the first in a series of nine articles on the Hubbard case. In the course of his assignment, Sarge accumulated an extensive file of documents on the case, including clippings from other publications.

4. Defendant Costopoulos, a criminal defense attorney, was retained by the Hubbard family to review the court records, trial exhibits, post-trial investigation reports and other materials related to the murder conviction of their son, Kim Hubbard, and to propose further actions to exonerate him.

5. In June, 1985, Costopoulos wrote

an analysis/opinion of the Hubbard trial proceedings which was critical of the trial and the evidence used therein (referred to as "the report"). The report concludes that:

> After an exhaustive study of Commonwealth of Pennsylvania v. Kim Lee Hubbard, which included an analysis of evidence compiled by Joseph Hubbard, father of Kim, readings of the main trial transcripts, appellate briefs and court opinions, interviews with all three appellate counsels and others, and a field trip to South Williamsport, we arrive at the following conclusion: the Hubbard's assertion of a strong pattern of prosecutorial manipulation and/or tampering of evidence in this case has highly significant merit, but the impact of that pattern on the culpability of Kim Lee Hubbard is inconclusive. We do not have clear and convincing evidence to prove the innocence of Kim Lee Hubbard relative to the charge of murder in the second degree of which he was convicted on march 1, 1974, recognizing the extraordinary high standard of proof needed. However, at the same time and without contradiction, gross inconsistencies in evidence presented by the prosecution

cast a reasonable doubt on the question of Kim Lee Hubbard's guilt.

6. On June 30, 1985, after receiving the report, Sarge wrote and the Sunday Patriot News published an article (referred to as "the article") discussing the controversial evidentiary issues in the case and reciting excerpts from the report. The article alone is the subject of the instant lawsuit; the Costopoulos report is not alleged to be the defamatory publication.

7. The article mentioned that Mr. Ertel was the prosecuting District Attorney, as well as a former United States Congressman and candidate for the offices of Governor and Attorney General of Pennsylvania.

8. Plaintiff claims that defendants, The Patriot News and Sarge, "falsely, maliciously, recklessly and without probable cause libeled and

defamed Plaintiff," and that Costopoulos "recklessly and maliciously instigated, abetted and procured" the article. Plaintiff's Complaint ¶9 and ¶10.

DISCUSSION

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Pa.R.C.P. 1035(b). In deciding a motion for summary judgment the Court must examine the record in a light most favorable to the non-moving party. Mariscotti v. Tinari, 335 Pa. Super. 599, 485 A.2d 56, 57 (1984); Taylor v. Tukanowicz, 290 Pa. Super. 581, 435 A.2d 181, 183 (1984). For the reasons set forth below, defendants' motions for summary judgment are granted.

Ertel admits he is a public figure. Plaintiff's Complaint, ¶6; Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Thus, Ertel must make a prima facie showing that the defendants acted with actual malice in writing and publishing the article. New York Times v. Sullivan, 376 U.S. at 279-80 (1964). The Supreme Court has defined actual malice accordingly:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 88 S.Ct. 1323, 1325 (1968).

"To avoid summary judgment the non-moving party must set forth specific

facts by way of affidavit, or as otherwise provided in [Rule 1035], demonstrating that a genuine factual issue exists." Liles v. Balmer, 389 Pa. Super. 451, 567 A.2d 691, 692 (1989) (citations omitted). First, it should be noted that neither the article nor the report has been shown to contain allegedly false statements or to be false as a whole; further, there has been no suggestion that the documents upon which the defendant relied were false. Simply claiming that The Patriot News or Sarge had the will or desire to harm, without more, is insufficient to show malice. Henry v. Collins, 85 S.Ct. 992 (1965).

Actual malice must be proven with clear and convincing evidence. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2513 (1986); Bose Corp. v. Consumers Union, 104 S. Ct. 1949 (1984). However, a thorough examination of plaintiff's

Complaint, Answers to Interrogatories, Deposition Testimony, and various trial briefs, reveals that Ertel has failed to set forth that he can present evidence sufficient as a matter of law to support a finding of actual malice. To the contrary, it is undisputed that Defendant Sarge maintained extensive files chronicling the Hubbard case, including a collection of articles from two other newspapers and a magazine which reported the trial and were similarly critical of the proceedings and the outcome. See Sarge Affidavit at 3. He also possessed copies of defense briefs. Id. at 6. The articles which Sarge possessed discussed most, if not all, of the issues reported in the article. This uncontroverted evidence, standing alone, would not allow a jury or judge to find actual malice on the part of the defendants. Rather, it could only suggest that defendants acted

in reliance upon the materials available to them. Id. at 9-10.

The defendants' state of mind is also central to proof of malice or reckless disregard. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986). In the instant case, Ertel suggests nothing from which a judge or jury would be able to infer that defendants Sarge or The Patriot News Company believed anything other than the truth of the statements contained in the article. Instead, Ertel imputes malice by noting that he was not interviewed prior to the publication of the article, thereby arguing that The Patriot News and Sarge did not follow standard reporting procedures. Plaintiff's Complaint ¶12(b).

In Curran v. Philadelphia Newspapers, Inc., 376 Pa. Super. 508, 546 A.2d 639 (1988), alloc. denied 559 A.2d 37 (1989), the Superior Court noted that

failure to check the reliability of a source is an insufficient claim from which a trier of fact could find malice, unless plaintiff demonstrates an obvious reason to doubt the source's veracity. Similarly, the failure to discuss with Plaintiff the statements contained within the article will not, standing alone, sustain the burden of establishing that the offending article was written or published with malice or reckless disregard of the truth. See generally New York Times v. Sullivan, 84 S. Ct. 710 (1964).

In summary, Ertel has failed to set forth that he can present clear and convincing evidence as a matter of law to support a finding of actual malice. Accordingly, Defendants Costopoulos, The Patriot News Company and Dick Sarge's Motions For Summary Judgment are granted.

Gafni /s/ J.

APPENDIX B

ALLEN E. ERTEL Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
THE PATRIOT NEWS COMPANY, DICK SARGE & WILLIAM C. COSTOPOULOS	:	NO. 1908 Philadelphia 1991

Appeal From the Order Dated May 10, 1991
Docketed May 14, 1991
In Court of Common Pleas, Civil Division,
Philadelphia County, No. 2145
September 1985

BEFORE: CAVANAUGH, OLSZEWSKI and BECK, JJ.

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby REMANDED FOR PROCEEDINGS. JURISDICTION IS RELINQUISHED.

BY THE COURT:

David A. Ezewczak /s/

Prothonotary

Dated: November 17, 1992

ALLEN E. ERTEL Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
THE PATRIOT NEWS COMPANY, DICK SARGE & WILLIAM C. COSTOPOULOS	:	NO. 1908 Philadelphia 1991

Appeal From the Order Dated May 10, 1991
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In Court of Common Pleas, Civil Division,
Philadelphia County, No. 2145
September 1985

BEFORE: CAVANAUGH, OLSZEWSKI and BECK, JJ.

MEMORANDUM: FILED NOV 17 1992

This appeal is from an order granting summary judgment in favor of appellees in an action for defamation against The Patriot-News Company, Dick Sarge and William C. Costopoulos. The court found that the appellant, Allen E. Ertel, could not establish that an allegedly defamatory newspaper article was published with "actual malice." We find this ruling problematic as: (1) it ignores a significant piece of evidence tending to indi-

cate "actual malice" existed, and (2) it accepts the testimonial evidence of the party moving for summary judgment. Moreover, we do not find persuasive the additional arguments that the appellees present on appeal in favor of summary judgment. While not professing any opinion on whether Ertel can meet his burden of proof at trial, we conclude that the appellees were prematurely dismissed from this case. Hence, we reverse.

The instant matter is a civil action for defamation filed in 1985 by appellant Allen E. Ertel ("Ertel"). Ertel is a former District Attorney for Lycoming County, and subsequently was a successful candidate for the U.S. House of Representatives and unsuccessful candidate for governor and attorney general. This matter has its origins in a news article published June 30, 1985, by appellee

Sunday Patriot-News ("Patriot-News") and written by appellee Dick Sarge ("Sarge"), a Patriot-News reporter.[1] The article concerned a high-profile murder case Ertel successfully prosecuted while District Attorney, the 1974 prosecution of twenty-year old Kim Lee Hubbard for the murder of twelve-year old Jennifer Hill. The news article reported that the Hubbard family has crusaded since that conviction to clear their son of wrongdoing, and that at the prompting of Hubbard's father, Harrisburg-area criminal defense counsel, appellee William C. Costopoulos ("Costopoulos"), recently investigated allegations of impropriety in his conviction. As the article, itself, is crucial to an understanding of the lower court's holding and the parties' arguments on appeal, we summarize

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[1] The article is attached to this decision. See Exhibit A.

its contents as follows.

The Patriot-News article began on the first page of Section B of the Sunday edition. The article was captioned "Lawyer questions Hubbard's 1974 murder conviction." Appearing on the first page were two pictures, one of Ertel, under which appeared his name and "Prosecuted the case," and one of Costopoulos, under which appeared his name and "Did his own study." The Patriot-News article began by stating that Costopoulos' investigation concluded that the claim of Hubbard's family "of a strong pattern of prosecutorial manipulation and/or tampering of evidence has significant merit." However, the beginning of the article also related that Costopoulos concluded, although he found that there were enough inconsistencies in the evidence presented by the prosecution to cast a reasonable doubt on Hubbard's conviction, that after

an "'exhaustive study' . . . 'the impact on the culpability of Kim Lee Hubbard is inconclusive.'"

After two paragraphs of background information concerning Kim Lee Hubbard, his sentence and his current occupation, Ertel is first mentioned in the article's sixth paragraph, and reference to him continues into the seventh paragraph. The text of these paragraphs reads as follows:

> Hubbard was prosecuted by then-Lycoming County District Attorney Allen E. Ertel, who was the successful candidate in 1976 to represent the 17th district in the U.S. House of Representatives. Ertel was narrowly defeated for governor in 1982 by Gov. Dick Thornburgh and also lost a close race for attorney general in 1984 to LeRoy S. Zimmerman, the incumbent.
>
> QUESTIONED AT one point about Joseph Hubbard's continuing insistence that his son is innocent, Ertel said he did not feel that the prosecution's case was presented improperly. "In my mind, I never prosecuted

> anybody I didn't think was guilty," he said.

Except for one more reference to Ertel later in the article, Ertel's picture's caption and these two paragraphs are the only direct references to Ertel in the article.

The article continued by noting that for the past 11 years, Joseph and Dorisann Hubbard, Hubbard's parents, "have unrelentingly sought a new trial through a number of appeals, claiming the proceedings against their son were faulty." It recounted that Hubbard's father averred that the prosecution's tactics were a "charade" and "faulty." However, the article related that their appeals have been rejected in judicial proceedings through the state Supreme Court, the U.S. Middle District Court, the U.S. Third Circuit Court of Appeals. It related that most recently a petition

under the Post-Conviction Relief Act was dismissed without a hearing in Lycoming County Court. It further noted that "[t]he Hubbards also asked the state attorney general's office and the FBI to examine the case, but were rebuffed." "Still seeking to clear the family's name and still digging for new evidence," the article states that Hubbard asked Costopoulos to analyze the case and recommend an appropriate course of action.

The article then relates that Costopoulos "concentrated his attention on what he called the five areas of disputed evidence." These areas were (1) the condition of the victim's body when found; (2) the body's location in a South Williamsport cornfield; (3) tire casts of Hubbard's car presented as evidence; (4) casts of boot prints allegedly made by Hubbard in the cornfield claimed to have been found beneath the victim's body; and

(5) the victim's clothing. The article proceeds to discuss them seriatim.

The first area Costopoulos analyzed was the Hubbard's contention that the excellent condition of the victim's body when found belied the prosecution's theory on the timing of her death. The victim's body was found nine days after she allegedly disappeared. Costopoulos' report asserted that that the temperatures in the cornfield approximated 50 degrees during that period, and based on the opinion of a pathologist and an embalmer, the body could not look fresh after it remained in a cornfield for that period of time. Thus, Costopoulos concluded, ". . .if the body was not in the field for nine days, then it was refrigerated. And if it was refrigerated, another person or persons dumped the body in the cornfield before Oct. 28 for it to be 'discovered.'"

Costopoulos also examined conflicting testimony of witnesses as to where the body was initially found. A Civil Air Patrol Officer testified that he first discovered the body 27 feet from Sylvan Dell Road, with the body lying between the rows of corn. Testimony, however, indicated that the body was found 127 feet from the road laying across the rows of corn. Since the only evidence directly linking Hubbard to the scene was a cast of his boot allegedly found under the body at 127 feet and an alleged cast of his tire treat at 100 feet, Costopoulos felt that the conflicting testimony may have indicated the evidence linking Hubbard to the crime scene was manufactured.

Costopoulos' report, as related by the Patriot-News, additionally indicated that there were significant discrepancies in the tire cast evidence allegedly

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linking Hubbard's car to the crime. Costopoulos states that the prosecution said the cast of tire tracks were made at the crime scene on Oct. 28 and the prosecution alleged them to be that of Hubbard's car on the day the victim disappeared. Notwithstanding, Costopoulos noted, that one of the tires allegedly matched on Oct. 28 was not put onto Hubbard's car until Oct. 29 -- 10 days after the murder. Furthermore, Costopoulos claimed that one tire cast from the crime scene allegedly shows an imprint of "ELD" from the sidewall of a Kelly-Springfield tire. According to several experts, Costopoulos averred, it was impossible for such an imprint to have been made unless the tire was on the rim. The article reports Costopoulos' speculation that the tire casts were fabricated while the car was impounded.

In recounting the fourth area of

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disputed evidence, the alleged manufactured bootprint, the article is not highly specific. It merely recounts Costopoulos' view that "[t]he only conclusion to be reached is that [the cast] is not a cast of heel prints taken at the 127 1/2 foot scene of the victim's body."

Finally, the article reported Costopoulos' assertion that there was conflicting testimony as to what clothes the victim was wearing at the time of her disappearance. The article implies that this has significance in whether or not she actually disappeared when it is believed she disappeared. The article notes during this part of the piece that the principle witness for the prosecution, who saw the victim get into Hubbard's car, had been hypnotized before testifying. The article then noted that "Ertel later acknowledged this was done 'to assist her recollection.'"

The article goes on to note that the Hubbard family would like a new trial for their son, who is presently out on parole, but Costopoulos said that "a new trial can only be sought after containing significant new evidence on where and by whom Jennifer Hill was killed." The article then concludes as follows:

> JOE HUBBARD is convinced he knows who placed the hands on Jennifer Hill's neck with such force that strangulation occurred.
>
> In his analysis, Costopoulos tells of three factors that indicate where the death took place and points a finger, but that information is being withheld by the Sunday Patriot-News, since no charges have been filed.
>
> Costopoulos recommended to the Hubbard family that their aim of clearing the name of their son "is best served at the present by extralegal means, namely, further investigation."
>
> "Their legal recourse has been virtually exhausted." Costopoulos wrote, "and it is our professional opinion that the Hubbards can currently expect

> no positive result from a criminal justice system that has served them so poorly in the past."
>
> Joe Hubbard said last week he will continue that investigation "until my dying day," a quest for vindication that's become a passion in the family's life -- with "a lot of community support," Costopoulos noted.

After reading the article, Ertel demanded and received from the Patriot News an apology, which was published in the July 7th edition of the Patriot-News. It begins as follows:

> The Patriot-News Co. retracts any and all implication that Allen Ertel, as district attorney for Lycoming County, acted improperly when he prosecuted Kim Lee Hubbard, and apologizes for any inference contained in the June 30, 1985, Sunday Patriot-News that Ertel acted improperly when he presented the Commonwealth's case against Kim Lee Hubbard in 1974.

The apology further notes that the June 30, 1985 article consisted of published excerpts from a private attorney's memo-

randum prepared at the expense and direction of the Hubbard family, who were attempting to vindicate their son. All evidentiary matters, the article acknowledges, have been decided in favor of Ertel's handling of the evidence. It continues:

> The article which appeared last Sunday was based solely on the private legal memorandum prepared by the lawyer employed by the Hubbard family. Ertel was not interviewed for the story which appeared last Sunday, nor did the Patriot-News conduct its own independent investigation. In the opinion of management of the Patriot-News Co. the failure to interview interview Ertel was a lapse from its standard procedures and [it] [sic] apologizes to Ertel and his family for any embarrassment that may have resulted from the failure to provide Ertel with an opportunity to respond to the accusations in the Hubbard family memorandum.

The article then states in light of its belief that Ertel should be given a chance to respond, the Patriot-News is

providing Ertel space to respond.[2]

Ertel filed this action by Praecipe for Writ of Summons on September 12, 1985, and he filed a Complaint on January 14, 1986. After answers were filed by the appellees in May, 1986, and after replies to the New Matter of the Defendants were filed by the appellant in July, 1986, the appellees filed a Motion for Summary Judgment in March, 1989. These motions were denied without prejudice to the trial judge's right to reconsider the matter at a later stage in the proceedings as material factual issues remained in dispute. Subsequently, the appellees resubmitted their motion for summary judgment, the bases for which we recount as helping to elucidate our analysis.

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[2] As the response is not relevant to this appeal, we have not recounted it in this decision.

Sarge and the Patriot-News moved for summary judgment based on the belief that Sarge, in preparing the article, allegedly "accumulated an extensive file of documents on the case, including clippings from two other newspapers and a magazine, all of which at sometime mentioned the same controversial issues mentioned in the disputed June 30, 1985 article." Apparently, their position was that their story regarding the "five disputed areas" is merely an elaboration of previous stories, not all of them in the Patriot-News, regarding disputed evidence or evidence tampering at the Hubbard trial. Summary judgment should be granted, in their view, because a reporter's file with this kind of documentation illustrates that the plaintiff could not possibly prove they had "actual malice." Costopoulos, moreover, moved for summary judgment on the following

grounds: (1) his report was protected as (a) attorney work product and (b) attorney-client confidential communications concerning potential future litigation and (2) the report is an opinion regarding the official conduct of a public official and thus is constitutionally protected.

Sarge and the Patriot-news supported their motion for summary judgment with the following exhibits: (1) Ertel's Complaint; (2) their Answer; (3) Sarge's affidavit (which included numerous articles concerning the Hubbard case published prior to the June 30th article); (4) the dissenting Opinions in Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977); (4) Ertel's reply to Costopoulos' Interrogatory number 26; (5) an excerpt from Ertel's deposition testimony to the effect that he was shown some Weekender articles; (6) the Patriot-

News July 7th apology; and (7) an article from the Patriot-News reporting that Ertel was the 1985 Democratic candidate for the Pennsylvania Supreme Court. Of particular importance to Sarge and the Patriot-News' position is Sarge's affidavit and its accompanying exhibits. Sarge's affidavit claims that he relied on a file of documents in preparing the June 30th story.[3] Enclosed with the affidavit are numerous newspaper articles and other exhibits which discuss the Hubbard trial, many of which refer to one or more of the "five disputed areas" of evidence.[4]

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[3] We note that Sarge's affidavit is vague in describing whether all the documents attached to his affidavit were included in his alleged "reporter's file," and what documents he specifically relied on in preparation of the June 30th article.

[4] The following articles enclosed with the Sarge affidavit refer to one or more of the "five disputed areas:" Williamsport Grit, September 13, 1974

Costopoulos supported his motion for summary judgment with (1) Ertel's Complaint; (2) Ertel's reply to his Interrogatories; (3) Costopoulos' affidavit; (4) his report reviewing the Hubbard

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(deceased's clothing); Sun Gazette, September 12, 1972 (body location, body condition, tire cast, bootprint, deceased's clothing); Williamsport Grit, September 15, 1974 (body location, footprint, deceased's clothing); Patriot-Evening News, February 12, 1977 (body location); Patriot-Evening News, June 22, 1977 (tire cast); Williamsport Grit, July 31, 1977 (body location, body condition, tire cast, footprint, deceased's clothing); Williamsport Grit, August 7, 1977 (body condition); Williamsport Grit, August 28, 1977 (tire cast); Williamsport Grit, September 4, 1977 (tire cast, footprint); Williamsport Grit, September 18, 1977 (time of murder); the Weekender, March 7, 1980 (body location, body condition, tire cast, footprint, deceased's clothing); the Weekender, March 14, 1980 (body location, tire cast, footprint, deceased's clothing, time of murder); the Weekender, March 21, 1980 (body location, tire cast, footprint, deceased's clothing); the Weekender, April 5, 1980 (body condition); the Weekender, April 25, 1980 (body location, body condition, tire cast, deceased's clothing, Ertel letter to the editor); the Weekender, May 14, 1980 (body condition, deceased's clothing).

case; (5) Costopoulos' deposition; (6) Costopoulos' response to Ertel's request for production of documents; (7) an October 29, 1986, order denying the production of documents; (8) a letter from Costopoulos' attorney to Ertel's counsel; and (9) excerpts from Ertel's deposition. Of particular pertinence is Costopoulos' affidavit and deposition. Costopoulos' affidavit asserts that he prepared the Hubbard report confidentially at the Hubbard family's request in his capacity as a lawyer. The affidavit claims he had no knowledge that the Hubbard family would attempt to publish the report. Costopoulos' deposition testimony, moreover, states that he cannot recall whether Sarge informed him that he would publish the Hubbard report or not. He only remembers that Sarge did in fact call him.

Of importance to all three appellees

positions is Ertel's response to Costopoulos Interrogatory 26, which they feel is an admission that there exists no defamatory statements in the article. They note that Costopoulos propounded the following interrogatory to Ertel:

> Identify each statement contained in the [Article] published June 30, 1985 by the Patriot News] Exhibit "A" to the Complaint which you attribute to Defendant Costopoulos and which you contend is defamatory and/or supports the allegations in paragraphs 9, 10, 11 and 12 of the Complaint. Plaintiff may answer this interrogatory by underlining portions of Exhibit A to the Complaint, a copy of which is attached for that purpose.

They believe that Ertel's response is revealing:

> I do not attribute any one statement, but the entire article, its tone, and conclusions are all attributable to Defendant Costopoulos as well as the other defendants.

The lower court granted appellees' request for summary judgment. Starting

with Ertel's admission (in his pleadings) that he was a public figure, the lower court noted that as the seminal Supreme Court case New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), Ertel must made a prima facie showing that the defendants acted with actual malice in writing and publishing the article. The lower court noted that whether actual malice exists is a subjective, not an objective, test:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to conclude that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice.

Lower Court Opinion at 5, quoting St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267

(1968). The lower court held that Ertel failed to provide sufficient evidence as a matter of law to prove actual malice by clear and convincing evidence. It believed that the complaint, answers to interrogatories, deposition testimony, and various trial briefs displayed this inability to prove actual malice. Further, it found important that Ertel did not dispute that Sarge maintained an extensive file pertaining to the Hubbard case, including a collection of articles from two other papers that were similarly critical of the issues raised in the article. The lower court asserted that these materials uncontrovertibly show that the appellees did not have serious doubts as to the article's truth.[5]

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[5] The lower court opinion also rebuts Ertel's argument that the failure to interview him prior to publication indicates enough malice to survive summary judgment. The Court rightly reasoned that Curran v. Philadelphia News-

Ertel claims on appeal that the lower court erred in granting the summary judgment motion. He believes ample evidence exists from which actual malice may be inferred. He relies on the following: (1) his complaint; (2) his affidavit; (3) appellees' knowledge that the several courts that reviewed Hubbard's case sustained his conviction; (4) the July 7, 1985, apology by the Patriot-News, which he believes contains several harmful admissions to appellant's position; and (5) the admitted fact that Ertel was not interviewed for the article. In particular, Ertel highlights that the July 7, 1985 "apology," which he deems a full retraction, contains "admis-

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papers, Inc., 376 Pa.Super, 508, 546 A.2d 639 (1988), alloc. den. 559 A.2d 37 (1989), indicates that the failure to check the reliability of a source is an insufficient claim from which a trier of fact could find malice, unless the plaintiff comes forward with an obvious reason to doubt the source's veracity.

sions" that (1) any and all implications that Ertel acted improperly when he prosecuted Hubbard were retracted, (2) Sarge used only the Costopoulos memorandum in preparation of the article and (3) Ertel was not interviewed for the article. He further argues that Nanty-Glo Borough v. American Surety Company, 309 Pa. 236, 163 A. 523 (1932) mandates that the court must disregard the appellees' affidavits and deposition testimony, as the fact-finder may disbelieve the testimony presented therein. In particular, the thrust of his argument is that the Nanty-Glo principle precludes our consideration of the research file, since Sarge's affidavit is the only evidence which states he used the file, and a jury could believe that Sarge, in fact, did not use it.

After careful review of the parties' submissions and the record, we believe

that the lower court's reasoning is erroneous, and in Part I infra explain why this is so. We also address in Part I arguments made by the parties' which we think are pertinent to our analysis.

The lower court granted summary judgment to Sarge, the Patriot-News and Costopoulos based on its belief that Ertel had not shown he could establish "actual malice" by clear and convincing evidence. The lower court did not address the other arguments presented by Sarge and the Patriot-News pertaining to the appropriateness of summary judgment. We address in Part II the additional arguments that appellees Sarge and the Patriot-News made in favor of their motion for summary judgment. We find these arguments meritless.

Presumably, the lower court granted summary judgment for Costopoulos on the (not mistaken) rationale that if Ertel

could not recover for Sarge's writing the article and the Patriot-News' publication of it, Ertel could not recover from Costopoulos, the author of the report, for the article's publication. It must be noted that Ertel is suing based only on the article's publication. Thus, the lower court did not address Costopoulos' substantive arguments in his motion for summary judgment. We address them in Part III, and find his arguments meritless.

I.

We find that the lower court erred in ruling that Ertel has not set forth enough evidence as a matter of law to support a finding of "actual malice." Key to our analysis is the "apology" published on July 7, 1985 in the Sunday Patriot-News, which the lower court ignored in hits analysis. This apology directly stated that Sarge prepared his

article only from Costopoulos' legal memorandum. A jury could potentially believe from this statement that Sarge in fact did not use his file of documents. Moreover, we are troubled by the lower court's failure to apply the Nanty-Glo principle to the case at hand. The court, given that a Sarge affidavit is the only indication that a "reporter's file" was used to prepare the story, erred by basing its ruling primarily on the existence of the file. Although we could anticipate a situation where summary judgment could be granted in an actual malice case based on a reporter's research file containing reputable source material, we find that the lower court erred in finding that a jury could not find that actual malice existed presently by clear and convincing evidence.

We note that ordinarily the granting of summary judgment is appropriate under

the following conditions:

> Ordinarily, summary judgment should only be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Pa.R.C.P. 1035. And see David v. Pennzoil Co. 438 Pa. 194, 264 A.2d 597 (1970); Bollinger v. Palmerton Area Com. Endeavor, Inc., 241 Pa. Superior Ct. 341, 361 A.2d 676 (1976). Furthermore, summary judgment is only proper in cases which are clear and free from doubt as to the existence of a disputed factual question. See Mallesky v. Stevens, 427 Pa. 352, 235 A.2d 154 (1967); Toth v. Philadelphia, 213 Pa. Superior Ct. 282, 247 A.2d 629 (1968). In ruling on a motion for summary judgment, the court must accept as true all well-pleaded facts in the non-moving party's pleadings, as well as admissions on file, giving to them the benefit of all reasonable inferences to be drawn therefrom. See Hankin v. Mintz, 276 Pa. Superior Ct. 538, 419 A.2d 588 (1980); Ritmanich v. Jonnel Enterprises, Inc., 219 Pa. Superior Ct. 198, 280 A.2d 570 (1971). The Record as a whole should be examined in the light

> most favorable to the party opposing the motion and all doubts as to the existence of a genuine issue about a material fact must be resolved in that party's favor, that is, against the entry of summary judgment. See Bowman v. Sears, Roebuck & Co., 245 Pa. Superior Ct. 530, 369 A,2d 841 (1968). And see Hankin v. Mintz, supra; Ritmanich v. Jonnel Enterprises, Inc., supra. In disposing of such a motion the court's function is not to decide issues of fact, but solely to determine whether there are material issues of fact to be decided. See Hankin v. Mintz, supra; Ritmanich v. Jonnel Enterprises, Inc., supra.

Community Med. Services v. Local 2665, AFSCME, 292 Pa.Super. 238, 242, 437 A.2d 23, 25 (1981); accord Raffensburger v. Moran, 336 Pa. Super. 97, 102, 485 A.2d 447, 450 (1984).

The applicable standard for granting of summary judgment in connection with "public official" defamation actions was at one time the cause of controversy on this Court. See Brophy v. Philadelphia Newspapers Inc., 281 Pa. Super. 588, 422 A.2d 625 (1981); Curran v. Philadelphia Newspapers, Inc., 261 Pa.Super. 118, 395

A.2d 1342 (1978). In Curran, Judge Spaeth, speaking for a divided court in the Opinion in support of Affirmance, commented that in first amendment cases, summary judgment is a "preferred procedure." Curran, supra, at 127, 395 A.2d at 1346. Relying heavily on Judge Wright's concurring opinion in Wasserman v. Time, Inc., 424 F.2nd 920 (1970), Judge Spaeth reasoned that summary procedures are essential to protect the exercise of First Amendment rights, in that litigation could have a stifling effect on freedom of speech. Id. at 128-9, 395 A.2d at 1347-8. Judge Spaeth, based on his reading of Judge Wright's Concurring Opinion, promulgated the following standard to be employed by a trial court in determining a motion for summary judgment in a public official libel case:

When a public official sues a

> newspaper for defamation, the court must on a motion for summary judgment make a threshold inquiry into actual malice: Unless the court finds on the basis of pretrial affidavits, depositions and documentary evidence that the plaintiff can prove actual malice int he New York Times sense, it should grant summary judgment for the defendant . . .. It is not enough for the plaintiff, in resisting summary judgment to argue that there is a jury question as to malice; he must make a showing of facts from which malice may be inferred . . .. Such an inference must be clear.

Curran, supra, at 129-30, 395 A.2d at 1348.

The Opinion in Support of Affirmance was taken issue with in the lead opinion of Brophy, supra, written by Judge Cavanaugh. The lead opinion noted that the standard articulated in Curran, supra, seemed to reflect a heavy debt to the concurring opinion of Judge Wright in Wasserman, supra. Brophy, supra, at 597-8, 422 A.2d at 630. The lead opinion also indicated that the standard proposed

in Curran and in Judge Wright's Concurrence seemed to differ from summary judgment practice in at least two ways. Id. at 598, 422 A.2d at 631. First, the standard seemed to imply that that the trial court was not required to view the evidence in the light most favorable to the non-moving party. Id. Second, the standard implied that the trial court must make an independent, initial determination as to whether the plaintiff can establish actual malice with convincing clarity, instead of determining if there appeared a genuine issue of fact from which a jury could reasonably find the presence of actual malice with convincing clarity. Id; See also, Comment, The Propriety of Granting Summary Judgment for the Defendants in Defamation Suits Involving Actual Malice, 26 Vill.Law.R. 470, 493 (1981). The lead opinion set forth its own standard for when the

granting of summary judgment was appropriate in an "actual malice" case:

> [A] trial court confronted with a motion for summary judgment in a public official or figure defamation case must deny the motion if, viewing the evidence and all inferences arising therefrom in the light most favorable to the plaintiff, there appears a genuine issue of fact from which a jury could reasonably find actual malice with convincing clarity.

Brophy, supra, at 601, 422 A.2d at 632.

We have subsequently followed this standard, though we have articulated it in slightly different ways, as evidenced by our following pronouncement in Raffensberger, supra:

> If the evidence . . . measures up to the New York Times standard, the case is one for the jury . . . [T]he function of the trial court [on motion for summary judgment] is not to weigh proof and make independent findings, but rather to determine whether or not the plaintiff has demonstrated a genuine issue of material fact from which a jury, using the appropriate burden of proof--'clear and convincing' evidence

> -- could find publication of a defamatory falsehood with actual malice.

Raffensberger, supra, at 109, 110, 485 A.2d at 454; accord Community Med. Services, supra, at 234-6, 437 A.2d at 26-27.

Ertel admits, as a former holder of public offices and a candidate for various political offices, he is a public figure. Under the standard promulgated in the famed New York Times v. Sullivan, supra, a public figure must prove that an article was published with "actual malice." "Actual malice" was defined by the Supreme Court in that case as a defamatory falsehood proven by a public official to be made "with knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, supra, at 279-280, 84 S.Ct. at 726. The Supreme Court has defined what is meant by the phrase "reckless con-

duct:"

> [Reckless] conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. at 731, 88 S.Ct. at 1325, 120 L.Ed.2d at 267. Actual malice must be proven with clear and convincing evidence. Bose Corp. v. Consumers Union, 466 U.S. 485, 511 n.30, 104 S.Ct. 1949, 1965 n.30, 80 L.Ed.2d. 502, 524 n.30 (1985). The burden of proving falsity of the defamatory statement is on the plaintiff. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558 (1986), rev'g Hepps v. P.N.I., 506 Pa. 304, 485 A.2d 374 (1984).

We believe the lower court erred in

finding that there was not enough evidence from which Ertel could show actual malice by clear and convincing evidence. The lower court relied primarily on the existence of Sarge's "reporter's file," which his affidavit claims existed and was used to prepare the June 30th article. The tenor of the lower court's reasoning is that the "reporter's file" is unassailable indication that publication of the article was made in good faith. However, the July 7, 1985 apology to Ertel published in the Patriot-News states that "[t]he article which appeared last Sunday was based solely on the private legal memorandum prepared by the lawyer employed by the Hubbard family." The apology goes on further to state that "Ertel was not interviewed for this story, nor did the Patriot-News conduct its own private investigation." (emphasis added). We find that these

statements could be reasonably construed by a jury to indicate that Sarge, in fact, did not use his "reporter's file" in preparation of the article. These puzzling statements indicate a genuine material issue of fact exists as to whether the appellees acted with reckless disregard to the article's truth or falsity.

We believe, even if we ignore the July 7th apology, that the Nanty-Glo principle provides an even clearer rationale why the lower court erred on this ruling. As noted supra, the Sarge and Patriot-News motion for summary judgment relies primarily on documents Sarge claims he used in preparation for writing the June 30th article. However, the only way the lower court knew of his alleged reliance on these documents is because of Sarge's affidavit stating that he did in fact rely on these documents. The Nanty-

Glo principle has been articulated as follows:

> [T]he general rule that flows from Nanty-Glo is that summary judgment may not be had where the moving party relies exclusively upon oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of fact.

Garcia v. Savage, 402 Pa.Super. 324, 328, 586 A.2d 1375, 1378 (1991). Hence, we find the reliance on the "reporter's file" misplaced. We note that the lower court ignored this important issue in its opinion despite the Nanty-Glo issue having been argued in the appellant's brief before it.

Appellees try to avoid the application of Nanty-Glo in several ways. Appellees Sarge and the Patriot-News claim that the issue in this case is whether the appellees had actual malice, which is inherently an inquiry into their subjective state of mind. They feel that

Nanty-Glo should have no application where they have come forward with the Sarge file documents, and Ertel has not made an attempt to rebut the allegations contained in them. Costopoulos, moreover, claims that Ertel waived his Nanty-Glo issues for failing to include it in his Statement of Questions Presented section of his brief. He also asserts that Nanty-Glo is inapplicable where, as here, a lower court grants summary judgment based on more than the moving party's testimonial evidence. We disagree with their positions, and address their arguments seriatim.

Sarge and the Patriot-News argue that whether they had "actual malice" is inherently a subjective inquiry into their state of mind: did they publish a false statement or act in careless disregard of the truth? They assert the Nanty-Glo rule should have no application

where a reporter comes forward with a "reporter's file" in support of a motion for summary judgment. The tenor of this argument is that the Nanty-Glo rule rests uncomfortably with the constitutional inquiry necessary in an "actual malice" case, and that the law should be that the burden lies with Ertel to rebut the statements made in the Sarge file documents. Accordingly, they claim that the existence of the "reporter's file" absolutely contradicts the contention that they "knowingly" published a false statement or acted in careless disregard of the truth, such that summary judgment can be appropriately granted.

We disagree. The Pennsylvania Supreme Court in Curran v. Philadelphia Newspapers, Inc., 497 Pa. 163, 439 A.2d 652 (1981), held in part that the Nanty-Glo principle rests comfortably with the Constitutional burden a plaintiff has to

meet to survive summary judgment in an actual malice case. Id. at 184, 439 A.2d at 662. Notwithstanding their pronouncement that the "actual malice" standard must be met on a motion for summary judgment, the Court opined that the party moving for summary judgment could not support their motion only with the affidavits of two reporters working for a media defendant, which averred that an allegedly defamatory article was the product of miscommunication on their part. Id. at 183-4, 439 A.2d at 662. The Court held that despite the higher standard of proof in "public figure' defamation cases, the Nanty-Glo principle would prevent a party moving for summary judgment from relying on testimonial affidavits. Id. Relying on dicta in a then recent United States Supreme Court case, Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d. 411

(1979), our supreme court reasoned that whether an article was published with actual malice calls into question a defendant's state of mind, and such a question does not readily lend itself to summary disposition. Id. at 184, 439 A.2d at 662.

Given Curran, the lower court's use of Sarge's file in its granting of summary judgment is problematic. The only evidence that Sarge used the alleged research file comes from Sarge's affidavit. The trier of fact, especially in light of the July 7th apology, is free to disbelieve the averments in Sarge's affidavit.[6] We note that the application

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[6] Sarge and the Patriot-News claim that their article was only based on the opinion of "a prominent Harrisburg-area defense attorney" about a matter of public concern. They argue that the public has a right to know what a "skilful [sic] and competent criminal defense attorney" has concluded after reviewing the evidence in this case.

of Nanty-Glo serves the beneficial purpose of preventing a media defendant from creating a research file post-hoc and claiming in a motion for summary judgment to have utilized it.[7]

The appellees' credentials and credibility are more appropriately resolved by the trier of fact. Sarge and the patriot-News seem to argue for judicial cognizance that Costopoulos' report should be worthy of publishing, and that Sarge possessed in a research file reputable sources which supported the tenor of the report. However, the trier of fact is free to believe or disbelieve their assertions, and summary judgment is not the appropriate dispositional stage for accepting one side's rationalizations of its conduct, even if those rationalizations later prove to be true.

[7] Despite the Supreme Court's pronouncements in Curran, given the uphill battle a public figure must fight in a defamation case, the application of Nanty-Glo could be a waste of judicial resources where a reporter produces a research file of obvious reputable sources. The rationale behind the Nanty-Glo principle, as expressed supra, is to prevent a party moving for summary judgment from relying exclusively on oral testimony because oral testimony presents a credibility question for the trier of fact. Accordingly, it could be argued (although none of the appellees have done so) that the research file is not akin to

Costopoulos raises two arguments in his attempt to avoid Nanty-Glo. First, he claims that this issue is waived because of Ertel's failure to state his Nanty-Glo issue in a separate question in the Statement of Questions involved.[8]

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oral testimony and the Nanty-Glo principle should not apply. However, even if we believed Curran permitted us to deviate from the Nanty-Glo principle, we are reluctant to do so given the facts before us (and the appellees failure to argue it). We find very significant that the record indicates that no paper, except the Weekender, links Ertel's name to allegations of evidence tampering, and that Ertel claims that the Weekender may have been a partisan political tract published in part to hurt Ertel's chances in an electoral race.

[8] He notes that Pa.R.A.P. 2116(a) states as follows:

> The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts or particulars of any kind. . . . This rule is to be considered in the highest degree mandatory, admitting of no exceptions; ordinarily no point will be considered which is not set forth in the statement of

Second, he argues that Nanty-Glo only applies to situations where the moving party exclusively relies on testimonial evidence in a motion for summary judgment, whereas he relies also, inter alia, on the reply to Interrogatory 26.

We reject both arguments. Although it certainly would have been better advocacy if Nanty-Glo had been raised in a separate issue in Ertel's brief, we believe the formulation of Ertel's question raised on appeal is sufficiently broad enough to imply that some facts alleged by appellees (due to Nanty-Glo) should not be considered.[9] We note that

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questions involved or suggested thereby.

[9] Ertel phrased the sole issue he raises on appeal as follows:

> I. ARE THERE SUFFICIENT FACTS OF RECORD BY WAY OF PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES, ADMISSIONS OF FILE AND SUPPORTING AFFIDAVITS FROM WHICH A JURY

Ertel, as Costopoulos admits, briefed this matter for the lower court, and has argued it before us in his brief on appeal. Costopoulos has not referred us to a case with similar facts where Nanty-Glo was considered waived. We have, in fact, been able to find only one case where the Nanty-Glo issue was considered waived, and in that case, it was apparent that the issue was not raised at any stage of the proceeding. Lutz v. The Philadelphia Inquirer, ____ Pa.Super. ____, ____ n.1, ____ A.2d. ____, ____ n.1 (No. 2580 PHL 91, filed April 30, 1992).

We believe Costopoulos' second argument is ostensibly more appealing. Costopoulos notes that we have stated (at times) the Nanty-Glo principle as summary

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COULD INFER ACTUAL MALICE ON THE PART OF DEFENDANTS IN THIS CASE.

judgment cannot be granted where it rests exclusively on the oral testimony of a party.[10] Garcia v. Savage, 402 Pa.Super. 324, 586 A.2d 1375 (1991). Costopoulos argues that his motion for summary judgment was supported with more than just testimonial evidence. Thus, the drift of his argument is that we can grant summary judgment consistent with Nanty-Glo if the moving party, in addition to testimonial evidence on his own behalf, submits non-testimonial evidence which supports his position.

As we believe that Costopoulos has not submitted non-testimonial evidence which substantially aids his position, we find it unnecessary to address whether the Nanty-Glo principle applies exclusively to situations where a motion for

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[10] We have also stated the principle more generally as summary judgment cannot be granted where it rests upon the oral testimony of a party.

summary judgment is supported only by testimonial evidence.[11] The single item of non-testimonial evidence submitted by Costopoulos that could potentially be construed to significantly impact on whether actual malice exists is Ertel's reply to Interrogatory 26. That response, however, does not contain an admission that Costopoulos did not act with knowledge of the allegations' falsity or in careless disregard of their falsity. Moreover, as explained more fully infra, Ertel clearly does not admit in his reply that the statements made

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[11] We do not read, as Costopoulos suggests, Carringer v. Taylor, 402 Pa.Super. 197, n.1, 586 A.2d 928, 929 n. 1 (1990) to stand for the proposition that Nanty-Glo does not apply where the moving party rests on more than just testimonial evidence in its motion for summary judgment. The court in Carringer appeared to rely totally on admissions by the non-moving party to indicate there was no issue of fact.

We reserve the above question for a time when it is directly placed at issue.

regarding evidence fabrication are true. We find this argument meritless.[12]

We are cognizant that there is substantial authority that a reporter who relies on independent, reputable sources cannot be found to have actual malice. We find representative Judge Bork's decision in Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287 (D.C. Cir. 1988). In Liberty Lobby, The Wall Street Journal published an article

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[12] The dissent seemingly accepts the correctness of our disposition in relation to the Nanty-Glo issue. See Dissenting Memorandum by Beck, J., note 7. Its acceptance of the well-settled rule that summary judgment should not be granted to the movants based on their oral testimony, however, is at odds with its analysis. The dissent accepts at face value the appellees' protestations that the June 7th article is based on a "prominent Harrisburg attorney's" allegedly "exhaustive study" into the Hubbard allegations of improprieties. Dissenting Memorandum by Beck, J., at 9-10. Who Costopoulos is, what sort of investigation he conducted, and whether Sarge based his article on Costopoulos' report, would seem to be more appropriately addressed to the trier of fact.

which, inter alia, stated Liberty Lobby, a citizens' group, disseminated racist literature. After reciting various publications which had previously linked Liberty Lobby to the dissemination of racist literature, the court concluded that no jury could find that the article was published with knowledge of falsity or reckless disregard for truth. It declared as follows:

> [w]e think The Wall Street Journal's good faith reliance on previously published reports in reputable sources of Liberty Lobby's connections with Noontide and Western Destiny precludes a finding of malice as a matter of law. See Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 862 (5th.Cir. 1978) ("The subjective awareness of probably falsity required by [St.Amant] cannot be found where, as here, the publisher's allegations are supported by a multitude of previous reports upon which the publisher reasonably relied.")

Liberty Lobby, supra, at 1297. The Court upheld the lower court's granting of a

motion for summary judgment. Liberty Lobby, supra, at 1297; accord Liberty Lobby, Inc. v. Rees, 852 F.2d 595, 601 (D.C.Cir. 1988), cert. den. 489 U.S. 1010, 109 S.Ct. 1118, 103 L.Ed.2d. 181 (1989); McDowell v. Pacewonsky, 769 F.2d 942, 951 (3rd.Cir. 1985); Dickey v. C.B.S. Inc., 583 F.2d 1221, 1229 (3rd. Cir. 1978). However, we feel that the July 7th apology, together with the Nanty-Glo principle which declares that questions of testimonial credibility are for the finder of fact, creates a genuine issue of fact from which a jury could reasonably find actual malice by clear and convincing evidence.[13]

II.

Having determined that the lower court granted summary judgment on an

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[13] We also find that the considerations articulated in notes 6 and 7 militate that there exists a genuine issue of fact as to actual malice.

erroneous basis, we turn now to address the additional arguments presented by Appellees Sarge and the Patriot- in support of their motion. As noted supra, we address appellee Costopoulos' additional arguments separately, in section III. Before proceeding with our review, we note that we are forced to characterize appellees Sarge and the Patriot-News' arguments to a certain extent. Their brief, although not defective under our rules of procedure, relies heavily on rambling boilerplate recitations of the broad protections afforded by the First Amendment.[14] In many spots, their brief has not effectively related the law it cites to the facts on appeal. Consequently, the brief at times does little to advance our understanding of why the appellees believe that we should affirm

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[14] Typically, it might be added, not in the summary judgment context.

the lower court's grant of summary judgment.[15] We are constrained, therefore, to wade into their brief and made our own determination of what issues appellees wish us to address.

We believe a fair characterization of the additional arguments presented is as follows: (1) summary judgment should be granted because matters of public concern must be shown to be false before damages are awarded; (2) summary judgment should be granted because statements of opinion are not actionable under the First Amendment; (3) summary judgment should be granted because opinions relating to government activities are protected under Article I, §7 of the Pennsylvania Constitution; and (4) truth is

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[15] We note that although appellees are not required to include a "statement of the questions involved" section in their brief, see Pa.R.A.P. 2112, they are not prohibited from doing so and such a practice facilitates our review.

an absolute defense to a defamation action.[16] We will address Sarge and the Patriot-News' last argument first as we believe it presents the closest question.

Sarge and the Patriot-News assert that truth is an absolute defense to a defamation action, and that Ertel has not shown he can identify any false statement in the June 30th article.[17] They rely heavily on the presence of Sarge's "reporter's file" chronicling the history of the Hubbard case, which they believe shows there is no issue of fact as to falsity. Moreover, they assert that Ertel's answer to Interrogatory 26 admits that Ertel cannot identify anything false

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[16] We note, of course, that we have addressed Sarge and the Patriot-News' arguments pertaining to "actual malice" supra.

[17] We note that the lower court's opinion might be read to imply this was an alternative basis for its holding. See Lower Court Opinion at 3.

in the article.

Sarge and the Patriot-News misconceive the nature of the burden of production on a motion for summary judgment. The appellees are the moving party in the motion for summary judgment, and Ertel is the non-moving party. Appellees believe it is incumbent that the non-moving party (Ertel), in order to avoid summary judgment, must set forth by affidavit or otherwise specific facts to indicate a genuine issue of fact as to falsity existed. This is erroneous. While the law is that the non-moving party must set forth specifics facts by affidavit or otherwise in a motion for summary judgment, this burden of production does not fall on the non-moving party until the moving party shows there exists no genuine issue of material fact. This the moving parties, the appellees, did not do.

In Community Med. Services v. Local 2665, Etc., 292 Pa. Super. 238, 437 A.2d 23 (1981), we extensively set forth the burdens of production which occur during a motion for summary judgment:

> A party satisfies his burden of production with respect to an issue material to his case when he has made out a "prima facie" case as to such issue--i.e., a sufficient quantum of evidence which, if credited, would permit a judgment in his favor unless contradicted by credible evidence offered by the opposing party. Bailey v. Zlotnick, 77 U.S.App.D.C. 84, 85, 133 F.2d 35, 36 (1942)(motion for directed verdict). The establishment of a prima facie case by the party bearing the burden of persuasion as to an issue shifts the burden of the producing contradictory evidence to the adverse party. The burden of evidentiary production shifts from side to side during the course of the trial as each party introduces evidence sufficient to satisfy the test. See generally, 31A C.J.S. Evidence, supra, §110 at 184-88.
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> The same rule is applicable in a motion for summary judgment. On such motion the well-settled rule is that the moving party

> bears the burden of proving that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law. The movant may discharge his burden of proof by demonstrating that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position. 10 Wright & Miller, [Federal Practice and Procedure: Civil] §2727, at 531. A prima facie showing by the movant for summary judgment--i.e., the production of enough evidence to demonstrate such party's entitlement to a judgment if evidence were uncontroverted at trail--shifts the burden of producing evidence to the party opposing the motion. Summary judgment should be granted to the movant unless the opposing party offers competent evidence admissible at trial showing that there is a genuine issue as to a material fact. Id. at 536-37.

Id. at 244-5, 437 A.2d at 26-7, quoting Nader v. deToledano, 408 F.2d 31 (D.C. Cir. 1978); accord Alberichi v. Tinari, 374 Pa.Super. 20-22, 542 A.2d 127, 127-8

(1988).[18] Applying these principles, we believe that Sarge and the Patriot-News misconstrue the nature of the parties' burdens of production after a motion for summary judgment.

The appellees assert that the article and/or the report had to be shown by Ertel "to contain allegedly false statements or to be false as a whole." However, Ertel's complaint satisfies his burden at this stage in the proceedings: he has made allegations that establish a

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[18] We note that the burden of evidentiary production as described above originally came from a federal case describing the rules applicable in a motion for summary judgment in F.R.C.P. 56(c). See Nader, supra. However, inasmuch as our parallel to Rule 56, Pa.R.C.P. 1035, adopts language in the federal rule, our interpretation of Rule 1035 is to be guided by federal courts' construction of the same language in the F.R.C.P. 56. Michigan Bank, Nat. Ass'n v. Steensen, 211 Pa.Super. 405, 236 A.2d 565 (1967). In all ways relevant to the burden of production in a motion for summary judgment, Rule 1035 parallels F.R.C.P. 56.

prima facie case. Namely, Ertel has alleged that the article implies, inter alia, that the appellees knowingly published an article which falsely implied that Ertel in the Hubbard case had knowingly fabricated evidence and had participated in a pattern of prosecutorial manipulation and tampering of evidence. Thus, the burden of production shifted to party moving for summary judgment to show that no genuine issue as to any material fact exists such that he is entitled to judgment as a matter of law. The appellees, however, have not submitted evidence of this nature.[19]

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[19] The dissent claims that the June 7th article is not capable of a defamatory reading. Apparently, the crux of the dissent's position is that a publication that relates the private remarks of an individual who purportedly made a self-proclaimed "exhaustive study" of an issue, shields the publication (and the individual) from a defamation suit pertaining to that issue. This certainly is not black letter defamation law, as the law holds cupable a person that repeats a

Sarge and the Patriot-News' motion for summary judgment relies heavily on Sarge's so-called "reporter's file." All

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defamatory statement even if it is attributed to another person. See, e.g., Curran v. Philadelphia Newspapers, Inc., 497 Pa. 163, 178 n.5, 439 A.2d 652, 659, n.5 (1981) (When one person repeats a defamatory statement that he attributes to another person, it is not enough for the person who repeats it to show the statement was made by another person, but rather the truth of the statement must be shown); Lal v. CBS, Inc., 551 F.Supp. 356 (E.D. 1982)(under Pennsylvania law, owner of television station cannot escape liability for defamation by attributing it to third party, as one who repeats or republishes defamatory matters is subject to the same liability as if he had originally published it).

As the dissent recognizes, words are defamatory if they "tend[] to blacken a person's reputation or expose him to public hatred, contempt or ridicule or injury [sic] him in his business or profession." Dissenting Memorandum by Beck, J., at 8, quoting Agriss v. Roadway Express, 334 Pa. Super. 295, 483 A.2d 456 (1984). Certainly, the issue is not where the remarks were repeated, but whether the remarks blackened a party's reputation. Moreover, even assuming that the Patriot-News as a matter of defamation law was shielded from liability, Costolous as maker of the remarks would not be.

that the file tends to show is that similar past allegations relating to the Hubbard trial (and not necessarily Ertel) have appeared in several publications.[20] However, even assuming that these allegations had been previously made against Ertel, the existence of allegations in a publication does not make them true. Mere prior publication is no proof of verity. The sole inquiry before us presently is whether the appellees have submitted evidence which shows that there is no genuine issue of fact as to whether the allegations in the article were false. Sarge and the Patriot-News cannot really believe that we can accept that evidence tampering occurred in the Hubbard trial simply because it was printed in more than one newspaper, or even every

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[20] We have noted supra that the July 7th apology to Ertel bolsters his argument that Sarge did not use the file in preparing his article.

newspaper in the United States. Stated differently, Sarge and the Patriot-News have not come forward with any evidence that the allegations of evidence tampering are true. There is no affidavit from a person who participated in evidence tampering stating that it occurred, much less that Ertel participated in it. There is no deposition from an investigator corroborating their article's allegations. Undoubtedly the "reporter's file" articles indicate that allegations of evidence tampering et. al. have been made. However, the court has no basis for assuming these allegations are reliable.[21]

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[21] We note also that Costopoulos' motion for summary judgment does not assert truth as a defense, and he has not submitted any evidence on this issue. Rather, Costopoulos' motion is grounded on the premises that his "opinion" regarding a public figure was constitutionally protected and also that he is immune from liability because of the attorney work-product rule and because his report

Sarge and the Patriot-News characterize the existence of the articles as proof that there existed a "public debate" as to various facets of the Hubbard trial. Although we think it more appropriate for the trier of fact to make this determination, it is difficult to see the relevance of a public debate on the issue of whether the article's assertions are false. The existence of a public debate would go far to exonerate, if not completely exonerate, the appellees on the basis that they did not possess "actual malice." It would appear that the "reporter's file" adds significant strength to doubts whether the article was published with "actual

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was prepared for a client concerning future legal proceedings. There is no assertion in his motion that his report to the Hubbards was true, nor, apparently, did he support his motion with any evidence that would lead one to believe that the allegations of evidence tampering and other misfeasance were true.

malice," a question which necessarily involves the appellees' state of mind. However, we have already addressed that issue. It has no force on the issue of whether the allegations are actually true. Sarge's file does not establish that the allegations reported in the article have veracity. We cannot accept that past newspaper articles, which may or may not have veracity, indicate that no genuine issue of fact exists as to whether evidence tampering or other misfeasance occurred in the Hubbard case.[22]

Appellees contend that Ertel's response to Costopoulos' Interrogatory

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[22] We reiterate that the most extensive discussion of the "five areas of disputed evidence" occurred in the Weekender. Ertel claims that the Weekender was a partisan political tract published with the intent off harming Ertel's chances in a political race. Moreover, the Weekender was the only publication that linked Ertel to allegations of evidence tampering or fabrication.

26, set forth supra, is an admission that there is nothing defamatory about the June 30th article. Thus, they feel there is no question of material fact as to whether the article contained false statement. Sarge and the Patriot-News cite Bobb v. Kraybill, 354 Pa.Super. 361, 511 A.2d 1379 (1986), app. den. 513 Pa. 633, 520 A.2d 1384 (1987), as analogous. In a defamation suit, summary judgment was granted in Kraybill where the complainant failed to identify in his deposition testimony any piece of information in an allegedly defamatory newspaper article concerning him that was misquoted or false. Id. at 365, 511 A.2d at 1381.

We believe Ertel's response to this interrogatory does not support this argument. To assert that Ertel somehow is admitting by his response that the allegations in the article are true is a clear distortion of his reply. Although

Ertel's reply is evasive, it is plain that he does not state he believes the article to be true. The response gives quite the contrary impression. Ertel, although he is not specific about what he finds defamatory, plainly indicates that he believes the article is defamatory. Sarge and the Patriot-News' reliance on Kraybill, supra, is also misplaced. In Kraybill, the person allegedly defamed never complained that the articles put him in a bad light for something he admittedly did.[23]

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[23] The complainant in Kraybill, a marketing manager with the Pennsylvania Bureau of State Lotteries, requested a personal loan from a store owner who ran a lottery machine. Kraybill, supra, at 362, 511 A.2d at 1379. After contacting the police, the store owner was wired for sound and was instructed to tell the stat employee he could only grant his request if he took money form his lottery "winner's account," which lottery owners are apparently required to maintain to pay off successful players. Id. at 363, 511 A.2d at 1380. The complainant was caught on tape agreeing to this impropriety, and shortly thereafter was discharged from

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state employ. Id. The complainant in his civil suit did not assert that any of these above allegations were false. Id. at 365, 511 A.2d at 1281. Rather, he averred that the article was one-sided and did not fairly represent a proper perspective on the situation. Id.

The dissent relies heavily on Kraybill as analogous to the facts of the present case, notwithstanding the limited mileage that one can derive from that obviously frivolous case. The dissent claims that Kraybill and the present case are similar, in part, because a plaintiff in both cases does not question the accuracy of the reporting, but asserts that the article portrayed him in a bad light.

The dissent's characterization of Ertel's position is simply erroneous. The tenor of Ertel's claim is that the article either directly indicates or indirectly implies that he committed various improprieties in the Hubbard trial. Or as Ertel's complaint clearly denotes, inter alia, that he "had knowingly conducted a strong pattern of prosecutorial manipulation and tampering of evidence.. .." Ertel has never even tacitly implied that he believes these allegations have merit, especially in respect to his participation. It is pertinent to remember that the remarks said about the plaintiff in Kraybill were undeniably true, while it is a question of fact that evidence tampering even occurred in the Hubbard case, let alone that Ertel participated in the alleged tampering.

What appellees are basically arguing is that we should penalize Ertel for his failure to sufficiently answer the interrogatory, supra, by reading his answer in a light most favorable to their position. This we cannot do. On a motion for summary judgment, we must look at the evidence in the light most favorable to the non-moving party. We note that if Costopoulos was dissatisfied with Ertel's answer, he could have motioned the court to make an appropriate order for Ertel's noncompliance with Pa.R.C.P. 4005. See Pa.R.C.P. 4019(a)(1)(i). We find this argument meritless. However, as expressed supra, we do not believe that Ertel's evasive answer indicates that he is admitting there is no genuine issue of fact. We likewise do not find persuasive the suggestion that Ertel in this reply is somehow admitting that he cannot show actual malice.

In summation, we find that the appellees must demonstrate that there is no genuine issue of fact as to whether the article or report had false statements or was false as a whole. "The moving party has the burden of proving the nonexistence of any genuine issue of material fact." Marks v. Tasman, 527 Pa. 132, 1335, 589 A.2d 205, 206 (1991) (emphasis ours). We find that the appellees have not met this burden.[24] Summary judgment is not an automatic screening process to dismiss a weak case. Rather, it is an opportunity for a party to dismiss at a preliminary stage an opponent's weak case by showing no genuine issue of material fact exists. If a party can not or does not take advantage of this opportunity, the summary judgment

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[24] We do not endorse the loose way Ertel drafted his complaint and/or his evasive answer in Interrogatory 26.

motion should be denied.

Sarge and the Patriot-News next argument is that summary judgment should be granted because matters of public concern must be shown to be false before damages are awarded. Plaintiffs, inter alia, rely for this proposition on Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 C.Ct. 1558, 89 L.Ed.2d 783 (1986) and Dougherty v. Boyertown, 377 Pa.Super. 462, 547 A.2d 778 (1988).

We believe that our analysis supra correctly articulated the law relating to the parties' burdens of production in this case's motion for summary judgment. It is true that Hepps declared that "a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation." Hepps, supra, at ____, 106 S.Ct. at ____, 89 L.Ed.2d. at 792. But we have found nothing in appellees' citation of

the law and sparse argument to convince us that summary judgment necessarily forces Ertel to figuratively "put all his cards on the table." We note furthermore that Dougherty, supra, was decided in the context of a non-suit granted post trial. Although appellees' citation of the law appears correct, we do not think that Ertel is required to show the falsity of the article in a motion for summary judgment. At most, Ertel would have to meet his burden of production if the appellees could present evidence displaying there was no genuine issue of fact. We are accordingly unpersuaded by appellees' argument.

Sarge and the patriot-news (apparently) next assert that summary judgment should be granted because statements of opinion are not actionable under the First Amendment. The tenor of this argument appears to be that an article

based on facts disclosed in the article must necessarily not be actionable because of First Amendment concerns. As the article reported Costopoulos' opinion, and that opinion was based on facts disclosed in the article, they believe it is not actionable as a matter of law.

The appellees cite for support, inter alia, Braig v. Field Communications, 310 Pa.Super. 569, 456 A.2d 1366 (1983), cert. den. 466 U.S. ____, 104 S.Ct. 2341, ____ L.Ed.2d. ____.[25] They claim that Braig supports their position

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[25] We are cognizant that appellees attempt to develop this argument in more detail. However, our ability to review the nuances of this argument is significantly hindered by a lack of clarity in appellees' brief. It is not overstating the matter that sections of this argument are incomprehensible, due to the appellees' mish-mash of several different legal concepts and the brief's failure to properly apply the law to the case sub judice. As it is appellees' responsibility, not this court's, to properly develop an issue, we address this argument only to the extent we have done supra.

by distinguishing between a "pure" expression of opinion and a "mixed" one. According to section 566 the Restatement (Second) of Torts (1977), which Braig adopted, a pure expression of opinion occurs when the maker of the comment discloses the facts upon which he bases his opinion and then expresses a comment as to the plaintiff's conduct, character or qualification. A mixed expression of opinion, in contract, occurs when the commentator expresses an opinion that is apparently based on facts about the plaintiff which have not been stated and are assumed to exist by the parties to the communication. They rightly state that it appears from Braig indicate that "pure" expressions of opinion are constitutionally protected. Braig, supra, at 581, 456 A.2d at 1373.

We believe that the appellees' argument is simply erroneous. Although

"pure" expressions of opinion appear constitutionally protected, an opinion based on defamatory "facts" is not a pure opinion. appellees' argument ignores the existence of the legitimate question of whether Costopoulos' opinion was based on a demonstrably false factual connotation. If we accept appellees' reasoning, one could always escape a defamation action simply by couching a defamatory statement in the context of an opinion, as long as one put forth <u>any</u> basis for which that opinion could be made, even a fabricated basis. As the United States Supreme Court recently said:

> [e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of an opinion does not dispel these implications . . . As judge Friendly aptly stated: "[I]t would be destructive of the law

> of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"

Milkovich v. Lorain Journal Co., 497 U.S. ____, ____, 110 S.Ct. 2695, 2706, 111 L.Ed.2d 1, 17-18 (1990). An opinion can only be denoted as "pure" where the opinion is based on non-defamatory facts.[26]

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[26] For the above reason, the dissent's discussion in Part III is erroneous.

The tenor of the dissent's argument, similar to the appellees', is that the June 7th article reported an opinion based on "disclosed facts", and is thus constitutionally protected as a "pure opinion". But as noted in Milkovich, an opinion based on incorrect or incomplete facts is not constitutionally protected.

We thing it pertinent to note, even assuming that the allegations of evidence tampering are correct, the Patriot-News and Sarge's basis position is that Ertel was included in the article simply for informational purposes. In other words, neither they nor Costopolous has claimed that the intention of the article was to relate Ertel's involvement in the reported misconduct. Rather, the article, in

Finally, Sarge and the Patriot-News argue that summary judgment should be granted because opinions relating to government activities are protected under Article I, §7 of the Pennsylvania Constitution. They quote for support a portion of that section:

> The printing press shall be free to every person who may undertake to examine the proceedings of . . . any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . .

Apparently, the thrust of this totally

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their view, described other persons' (unnamed persons') misconduct. Thus, an assertion that the article reported constitutionally protected "pure opinion," at least with respect to Ertel, is unwarranted. The facts upon which the article was based had no significant nexus to any conduct of Ertel's except the fact he prosecuted the Hubbard case many years ago.

unpersuasive argument in that Pennsylvania affords the blanket protection of opinions made about a public figure.

This argument is contrary to the very words of this provision. Appellees forget that even the text they quote supra states that every citizen is "[] responsible for the abuse of that liberty." Moreover, appellees conveniently forgot to quote the rest of Article I, §7:

> No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. (emphasis ours.)

This provision holds that an action lies

for maliciously or negligently libelous papers regarding the official conduct of persons in a public capacity. Thus, Article I, § 7 is not a blanket protection for persons who make or publish a defamatory remark. Appellees, moreover, do not and can not refer us to any decisions within this Commonwealth that afford the interpretation of Article I, §7, that they want us to adopt it. This argument is meritless.

III.

We address now Costopoulos' additional arguments. He argues the following: (1) summary judgment should be granted as to Costopoulos because the report he made for the Hubbards is not at issue in this action; (2) his actions relating to the report are absolutely privileged as a communication preliminary to a proposed judicial proceeding; (3) the Costopoulos report was conditionally

privileged; and (4) his report consists of opinions and is therefore not actionable. We address each argument as follows:

Costopoulos claims that since Ertel complains of only the July 30th article, he should be dismissed from the case. He cites as support the lower court's statement that the Patriot-News "article alone is the subject of the instant action; the Hubbard Report is not alleged to be the defamatory publication." He goes on to assert that the lower court concluded in its opinion that since Costopoulos had nothing to do with the printing of the article, Ertel could not show "actual malice" against Costopoulos.

the lower court did not so conclude. We believe that the Costopoulos reads to much into the lower court's pronouncements. Although the lower court did find the article to be the only allegedly

defamatory item at issue, the lower court did not hold that Ertel could not show actual malice against Costopoulos. We feel, as noted supra, that the lower court reasoned that if the article alone was at issue, it would be appropriate to grant summary judgment to all parties, including Costopoulos, given that it felt Ertel could not show that the article contained falsehood or was published with "actual malice."[27]

We are thus required to address Costopoulos' argument that he should be dismissed because Ertel complains only of the June 30th article, and not the Costopoulos report. We find that it is meritless. One who procures the publication of a defamatory article, whether as agent of another or otherwise, is liable

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[27] We note that this reasoning is nowhere explicit in the court's sparse opinion.

to the person defamed. See, e.g., Kilian v. Stackpole Sons, Inc., 98 F.Supp. 500 (1951); Restatement of Torts 2d, Section 577, Comment F; Zier v. Hofflin, 233 Minn. 66, 21 N.W. 862 (1985). We accordingly reject Costopoulos' argument.

Costopoulos' next two arguments are that his work was covered by either (1) an absolute privilege as a communication in anticipation of a judicial proceeding or (2) was conditionally privileged. We address both arguments at the same time.

His former argument is that as an attorney acting within the scope of his representation, he should receive absolute immunity for liability for defamation. He cites Post v. Mendel, 510 Pa. 213, 223, 507 A.2d 351, 355 (1986) for this well-settled proposition:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial

> proceeding, or in the institution of, or during the course of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

He claims that even if his opinions rendered in the report appear unwarranted, the inclusion of those opinions will not convert a privileged opinion into a defamatory one.

His latter argument asserts that the Hubbard report was conditionally privileged because it was prepared at the instigation of the Hubbard family, seeking information that may exonerate their son. See Chicarella v. Passant, 343 Pa. Super. 330, 494 A.2d 1109 (1985); Beckman v. Dunn, 276 Pa.Super. 527, 419 A.2d 583 (1980). He believes that unless Ertel can prove that the conditional privilege to communicate the report was abused, e.g., that the report was written with "actual malice," summary judgment must be

granted.

We agree with Ertel that both these arguments miss the point. Ertel is not complaining about the Costopoulos report, but he is complaining about the republication of its substance. We believe our reasoning in Barto v. Felix, 250 Pa. Super. 262, 267-8, 378 A.2d 927, 930 (1977), appeal dismissed, 409 A.2d 857 (1980) assists in our explanation of this point and disposes off both these arguments. In Barto, a criminal defendant's attorney called a press conference in which he related the contents of his brief. Id. at 265, 378 A.2d at 929. The brief, and the attorney's remarks at the press conference, were allegedly defamatory to state troopers who investigated the case. Id. The state troopers sued for defamation, and the lower court ruled in the attorney's favor. Id.

On appeal, we ruled that the judi-

cial immunity granted to attorneys and others in a judicial proceeding does not apply to republications of statements made by a defense attorney outside of the judicial proceeding. Id. at 267-8, 378 A.2d at 930. We noted that as a matter of course a pubic defender's remarks filed with a court would be absolutely privileged. Id. However, remarks at a press conference, even if based on a client's judicial filings, are not considered made at a judicial proceeding, and are outside the ambit which the privilege is meant to protect.[28] Id. Costopoulos may be protected for statements made in the report were communicated solely to his clients. However, the report's contents were publicized, and thus one issue of fact to be resolved

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[28] We note in passing that the attorney's criminal defendant client in Barto was Kim Lee Hubbard.

is whether Costopoulos aided in the publication of that article.

Finally, Costopoulos claims that there exists no cause of action in defamation for an opinion based on disclosed facts. He asserts that all the facts upon which he based his report were contained in the report, and thus disclosed. Hence, he argues that Ertel can not possibly recover from him in a defamation action. As we have rejected the exact same argument supra when analyzing Sarge and the Patriot-News' additional arguments, we reject Costopoulos' argument on that basis.

Having found that the lower court erred in granting summary judgment, and also that the appellees have not persuaded us that summary judgment should be granted an alternative bases in the case sub judice, we reverse.

Our disposition in this case is

dictated by the principles of defamation law and summary judgment law in Pennsylvania as we understand them to be and is, of course, in no way to be interpreted as a comment on the ultimate merit of the claim asserted in this matter.

We remand for proceedings consistent with this Memorandum.

Jurisdiction relinquished.

Beck, J. files a Dissenting Memorandum.

ALLEN E. ERTEL Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
THE PATRIOT NEWS COMPANY, DICK SARGE & WILLIAM C. COSTOPOULOS	:	NO. 1908 Philadelphia 1991

Appeal From the Order Dated May 10, 1991
Docketed May 14, 1991
In Court of Common Pleas, Civil Division,
Philadelphia County, No. 2145
September 1985

BEFORE: CAVANAUGH, OLSZEWSKI and BECK, JJ.

DISSENTING MEMORANDUM BY BECK, J.:

FILED NOV 17 1992

This appeal is from an order granting summary judgment in favor of appellees, defendants below, in a defamation action brought by appellant, Allen E. Ertel ("Ertel"). Appellees are The Patriot-News Company ("PNC"); Dick Sarge ("Sarge"), a reporter for PNC; and William C. Costopoulos ("Costopoulos"). The trial court granted appellees' motion for summary judgment primarily due to

finding that Ertel, as a matter of law, could not establish that an allegedly defamatory newspaper article was published with "actual malice." I find 1) that the article in question was not capable of defamatory meaning; 2) that appellant failed even to allege that the article contained or was based upon any falsehoods, much less meet his burden of proof as to such falsity; and 3) that the article constituted pure opinion protected by the First Amendment.[1] As any one of the above findings would be ample grounds for the granting of summary judgment in favor of appellants, without addressing the merits of the trial court's determination regarding actual malice, I would affirm on the grounds

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[1] These legal arguments were raised by appellees in their brief in support of motion for summary judgment, see reproduced record pp. 81a-83a, 93a-99a, and preserved in their briefs on appeal.

stated above. See E.J. McAleer & Co. v. Iceland Products Inc., 475 Pa. 610, 613 n.4, 381 A.2d 441, 443 n.4 (1977) (appellate court may affirm on any grounds); see also Wecht v. PG Publishing Co, 353 Pa.Super. 495, ---, 510 A.2d 769, 771 (1986).

Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pa.R.C.P. 1035(b). See Marks v. Tasman, 527 Pa. 132, 134-135, 589 A.2d 205, 206 (1991); Neish v. Beaver Newspapers, Inc., 497 Pa. 163, 177-178, 439 A.2d 652, 658-659 (1981), allocatur denied 527 Pa. 648, 593 A.2d 421 (1991); Livingston v. Murray, --- Pa. Super. ---, ---, --- A.2d ---,---

(1992), No. 1693 Pittsburgh 1991, slip op. at 3. An appellate court will overturn a trial court's entry of summary judgment only if there has been an error of law or a clear abuse of discretion. See Livingston, supra; see also Carns v. Yingling, --- Pa.Super. ---, 594 A.2d 337, 339 (1991).

The publication that is the subject matter of this appeal is a newspaper article written by appellee Sarge and published by the Sunday Patriot News on June 30, 1985. The text of the article in its entirety is provided below:

> "A prominent Harrisburg-area defense attorney has reviewed a 1974 Lycoming County murder trial and concluded that the claim of the convicted defendant's family 'of a strong pattern of prosecutorial manipulation and/or tampering of evidence has significant merit.'
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> "Attorney William C. Costopoulos was retained by Joseph Hubbard of South Williamsport to review the trial of his son,

Kim Lee Hubbard, which resulted in the younger Hubbard's conviction of second-degree murder on March 1, 1974, after a jury trial before Judge Charles F. Greevy.

"After an 'exhaustive study,' Costopoulos wrote that while 'the impact of that pattern on the culpability of Kim Lee Hubbard is inconclusive ... at the same time and without contradiction, gross inconsistencies in evidence presented by the prosecution cast a reasonable doubt on the question of Kim Lee Hubbard's guilt.'

"HUBBARD, THEN 20, was arrested Nov. 17, 1973, and charged with the Oct. 19, 1973, strangulation death of Jennifer Hill, 12, a friend of Hubbard's sister, Ruth.

"The former U.S. Marine was paroled on Nov. 18, 1983, after serving 10 years and one day of a 10 - 20-year sentence in the State Correctional Institution at Dallas, Luzerne County. He now works with his father in the home-improvement business.

"Hubbard was prosecuted by then-Lycoming County District Attorney Allen E. Ertel, who was the successful candidate in 1976 to represent the 17th district in the U.S. House of Representatives. Ertel was

narrowly defeated for governor in 1982 by Gov. Dick Thornburgh and also lost a close race for the attorney general in 1984 to LeRoy S. Zimmerman, the incumbent.

"QUESTIONED AT one point about Joseph Hubbard's continuing insistence that his son is innocent, Ertel said that he did not feel that the prosecution's case was presented improperly. 'In my mind, I never prosecuted anyone I didn't think was guilty,' he said.

"For the past 11 years, Joseph and Dorisann Hubbard, the younger Hubbard's parents, have unrelentingly sought a new trial through a number of appeals, claiming the proceedings against their son were faulty. A 'charade' and a 'circus,' Hubbard said last week in describing the prosecution's tactics.

"But their appeals have been rejected in judicial proceedings through the State Supreme Court, U.S. Middle District Court and the U.S. Third Circuit Court off Appeals. Most recently, a Hubbard petition under the Post-Conviction Hearing Act was dismissed without a hearing on Jan. 7, 1982, by Judge Robert J. Wollet in Lycoming County Court.

"THE HUBBARDS also asked the state attorney general's office and the FBI to examine the case, but were rebuffed.

"Still seeking to clear the family's name, and still digging for new evidence, Joseph Hubbard several months ago asked Costopoulos to analyze the case and recommend a course of action.

The Lemoyne-based lawyer concentrated his attention on what he called five areas of disputed evidence. They were the condition of the victim's body when found Oct. 28, 1973, the body's location in a South Williamsport cornfield, tire casts presented as evidence that Hubbard's car was driven on a lane through the field, casts of boot prints said to have been made by Hubbard and said to have been found beneath the body and the victim's clothing.

"THE HUBBARDS have long contended the girl's body was refrigerated between her death and the discovery of the body nine days later, and say they now have witnesses who will testify on the subject. Their suspicions were aroused first when Mrs. Hubbard attended an open-casket viewing of the victim and noted the excellent condition of the girl's body. Subsequently, a pathologist and

an embalmer told investigators that the victim could not have remained in the field for that period of time.

"Costopoulos wrote: '...if the body was not in the field for nine days, then it was refrigerated. And if it was refrigerated, another person or persons dumped the body in the cornfield shortly before Oct. 28 for it to be 'discovered.' ... The events of the murder of Jennifer Hill did not take place because it is a medical and scientific impossibility for an unrefrigerated nine-day-old body lying in a cornfield in 50-degree dry weather to appear 'fresh' upon discovery.'

"This discrepancy, in Costopoulos' judgment, 'is a fatal weakness in the prosecution's case.'

"COSTOPOULOS ALSO examined conflicting testimony of witnesses on precisely where in the cornfield the body was found. There were two contradictory locations. The first was where a Civil Air Patrol officer testified he first discovered the body, about 27 feet from Sylvan Dell Road lying between parallel rows of corn. The second, where the casts of tires in the lane and boot prints under the body were made, was 127 1/2 feet from Sylvan Dell Road,

with the body lying across the rows of corn.

"This conflicting testimony and other evidence that there were two different location--suggesting the body was moved, Costopoulos wrote, 'casts further doubt on the 127 1/2-foot location, not to mention the prosecution's case in general.'

"Costopoulos wrote, 'Kim was only linked to the scene of the body find, and by two pieces of evidence: tire casts made on the farm about 100 feet toward Sylvan Dell Road and boot casts made at the 127 1/2-feet location.'

"Continuing, he wrote, if the (first discoverer of the body and an associate) were correct in their location of 27 feet from the road, 'the cast evidence was fabricated because the defendant would not have gone beyond 30 feet ont he farm lane and therefore his tires and boots could not have made those impressions in the cornfield.'

"COSTOPOULOS also concluded that the left-front tire cast was made from a tire that was not even on Hubbard's car at the time the prosecution said the case was made at the site where the body was found Oct. 28.

"'Keeping in mind that the tire casts were poured on Oct. 28 and were said to be the impressions made by Kim's car on Oct. 19, the date of the murder, the prosecution's official evidence then included a tire which was not even on the car until October 29 -- 10 days after the murder. The only logical conclusion to be drawn is that (the tire cast in question) was fabricated,' Costopoulos wrote.

"He cited numerous other discrepancies in the tire evidence, including a right-rear tire cast that clearly shown an imprint of 'ELD' from the sidewall of a Kelly-Springfield tire.

"'According to several state police experts,' Costopoulos write, 'the tire of a moving vehicle cannot leave an impression of the tire's trademark.'

"He also questioned whether the mud in which the tire tracks were noted actually existed in the farm lane and wrote, 'There is evidence to suggest that some or all of the tire casts were possibly fabricated at the South Williamsport Borough Hall, where the car was impounded.'

"EXAMINING THE boot-print evidence, Costopoulos said, 'The only conclusion to be

reached is that (the cast) is not a cast of heel prints taken at the 127 1/2-foot scene of the victim's body.'

"The boot casts, Costopoulos said, linked Hubbard to the scene of the body find 'and probably was the most damaging piece of evidence overall.'

"Yet, the attorney said, 'The serious discrepancies surrounding the boot-cast evidence, like those of the tire casts, do not prove the innocence of Kim. But, again, without it, the commonwealth's already highly-circumstantial case would have been non-existent.'

"He also found 'numerous discrepancies relative to the victim's clothing, together with the condition and location of the body, suggesting that the body itself was tampered with.'

"AT THE TRIAL there also was conflicting testimony on whether the clothes the victim was wearing at the time of the autopsy was the same she was wearing when she disappeared, yet her family said she did not arrive home the day she disappeared.

"Costopoulos also discussed the principal witness who, with her daughter's assistance in identifying Jennifer Hill, said

she saw the victim entering what she said was Hubbard's car. This key witness had been hypnotized, Costopoulos notes, before testifying. Ertel acknowledged this was done 'to assist her recollection.'

"Kim Hubbard and his parents would welcome a new trial, Joseph Hubbard said, even though his son has been paroled, because they want to clear his name.

"Costopoulos said a new trial can be sought only after obtaining significant evidence on where and by whom Jennifer Hill was killed.

"Joe Hubbard is convinced he knows who placed the hands on Jennifer Hill's neck with such force that strangulation occurred.

"In his analysis, Costopoulos tells of three factors that indicate where the death took place and points a finger, but that information is being withheld by the Sunday Patriot-News, since no charges have been filed.

"Costopoulos recommended to the Hubbard family that their aim of clearing the name of their son 'is best served at present by extralegal means, namely, further investigation.

> "'Their legal recourse has been virtually exhausted.' Costopoulos wrote, 'and it is our professional opinion that the Hubbards can currently expect no positive results from a criminal justice system which has served them so poorly in the past.'
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> "Joe Hubbard said last week he will continue that investigation 'until my dying day,' a quest for vindication that's become a passion in the family's life -- with 'a lot of community support,' Costopoulos noted."

Based upon the above article, appellant filed suit against appellees claiming that they "falsely, maliciously, recklessly and without probable cause libeled and defamed plaintiff."[2]

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[2] It should be noted that the above-quoted article is the sole basis for appellant's action and that the claim against Costopoulos is not based upon the contents of his report, but rather upon his having "recklessly and maliciously instigated, abetted and procured" the article. Since we affirm the lower court's holding that Ertel may not recover damages for appellees Sarge and PNC's writing and publication of the article, it follows, as noted by the majority, that he cannot recover from

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The Pennsylvania Supreme Court has long held the view that whether speech is defamatory is a matter of law for the court to decide. Thomas Merton Center v. Rockwell Int'l Corp., 497 Pa. 460, ---, 442 A.2d 213, 215, cert. denied 457 U.S. 1134, 102 S.Ct. 2961, 73 L.Ed.2d 1351 (1982). See also, Baker v. Lafayette College, 516 Pa. 291, 296, 532 A.2d 399, 402 (1987); Cashdollar v. Mercy Hospital, 595 A.2d 70, 75 (Pa. Super. 1991). "If the court determines that the challenged publication is not capable of a defamatory meaning, there is no basis for the matter to proceed to trial." Merton at 215-216; Restatement (Second) of Torts, Sec. 614(1) (1977).

Costopoulos for aiding and abetting that publication. We do not, therefore specifically address the merits of Costopoulos' independent argument sin support of his own motion for summary judgment.

This court followed the dictates of Merton in the oft-cited case, Agriss v. Roadway Express, 334 Pa.Super. 295, 483 A.2d 456 (1984), which states: "[The] threshold question in an action for defamation is whether the communication is capable of a defamatory meaning. It is for the court in the first instance to make this determination...." Id. at 461.

Words are defamatory if they "tend[] to blacken a person's reputation or expose him to public hatred, contempt or ridicule or injury [sic] him in his business or profession." Id. See also Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971); Cashdollar, supra at 75 (citing Baker, supra); Brophy v. Philadelphia Newspapers Inc., 281 Pa. Super. 588, 422 A.2d 625 (1980).

In Merton, the Court acknowledged the need to "consider the full context of the article to determine 'the effect the

article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.'" Merton, supra at 216 (quoting Corabi, supra at 447, 273 A.2d at 901; see also Baker, supra at 402; Dobson v. WBRE-TV, Inc., 247 Pa.Super. 615, 500 A.2d 1227 (1985). The Court further cautioned that "[w]ords which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such interpretation unreasonable." Merton, supra at 216 (quoting the Restatement (Second) of Torts, sec. 563 comment d).

Application of these principles to the case at bar clearly dictates a finding that the article written by Sarge and published by PNC is not capable of a defamatory meaning. Appellant, in his complaint, pleads that the article im-

plied that he "had knowingly conducted a strong pattern of prosecutorial manipulation and tampering of evidence...." We find that, taken in context, the challenged publication does not accuse appellant in any way, expressly or implicitly, because it merely relates the conclusions of a private attorney, without asserting these conclusions as anything more than the result of one man's self-proclaimed "exhaustive study."

First, it should be noted that it is difficult to examine the article for the alleged defamation because appellant has failed to even specify which statements he considers to be defamatory. In response to an interrogatory by Costopoulos demanding that appellant specify "each statement ... which [he] attribute[s] to Defendant Costopoulos and which [he] contend[s] is defamatory...", appellant conceded the following: "I do

not attribute any one statement, but the entire article, its tone, and conclusions are all attributable to Defendant Costopoulos as well as the other defendant." Nevertheless, we shall indulge appellant by examining the contest of statements that we presume to be the basis for this action.[3]

The article states that Costopoulos "concluded that the claim of the convicted defendant's family 'of a strong pattern of prosecutorial manipulation and/or tampering off evidence has significant merit.'" In determining whether or not this statement is capable of defamatory meaning, it is initially necessary to examine the context of the entire article. It was written in 1985, more than ten years after the trial and

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[3] We discuss the independent legal significance of appellant's failure to allege specific false and defamatory statements, infra parts II and III.

conviction of Kim Lee Hubbard. During those then years it is undisputed that many newspaper articles were written which analyzed the case and alleged prosecutorial manipulation and evidence tampering. Thus, the "news" gleaned by the average reader of the challenged article is not that in fact appellant is guilty of such conduct, but rather that a well-known defense attorney from Harrisburg was hired by the convicted murderer's family, and that this attorney's conclusions were consistent with the prior allegations made over the course of the ten years since the conviction.[4]

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[4] In alluding to the previously published articles, some of which were contained in the record that was given so much importance by both the trial court and the majority, we do not in any way affirm the trial court's reliance upon them in its determination concerning actual malice, (discussion infra, at p.18 n.7). Rather, we refer to them because their presence in the news arena is a contextual factor to be considered in assessing how the average reader would

This depiction of what the article really communicates to the average reader is further supported by the context of the potentially defamatory statements in the article itself. It is significant that Sarge juxtaposed Costopoulos' incriminating conclusions with the redeeming information that the Hubbards' assertions have been tried and rejected "in judicial proceedings through the state Supreme Court, U.S. Middle District Court and the U.S. Third Circuit Court of Appeals," and also that "a Hubbard petition under the Post-Conviction Hearing Act was dismissed without a hearing on Jan. 7, 1982...."

Further, it should be noted that the article mentions Ertel in only three places -- once to identify him as the prosecutor of the Hubbard case and as a

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understand the challenged article.

successful Pennsylvania politician, and twice objectively to present Ertel's own words of denial or explanation. The article quotes Ertel's response to the Hubbards' insistence that their son is innocent: "In my mind, I never prosecuted anybody I didn't think was guilty;" and the article provides Ertel's own explanation for why a key witness for the Commonwealth had been hypnotized--"to assist her recollection." Nevertheless, appellant contends that the result of these words is to imply that Ertel 1) prosecuted Hubbard for political advantage; 2) knowingly prosecuted an innocent person; and 3) knowingly elicited perjured testimony. I find that appellant's interpretation of an article, which merely portends objectively to report a privately hired attorney's personal conclusions, "puts an unfair and forced construction on the interpretation

of the publication," Merton at 217 (quoting Sarkees v. Warner-West Corp., 349 Pa. 365, 369, 37 A.2d 544, 546 (1944)), and is not "warranted, justified and supported by the publication." Merton at 217 (citing Bogash v. Elkins, 405 Pa. 437, 176 A.2d 677 (1962)).

In considering whether or not challenged speech can be the basis for recovery in a defamation action, Pennsylvania law requires strenuous application of the principles inherent in the First Amendment's freedom of speech and press. In Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964), a Senator brought a defamation action against a publication that accused him of having Communist voting tendencies. Finding the communication not capable of a defamatory meaning, the Pennsylvania Supreme Court warned that "[i]f freedom of the press or speech collides or conflicts with libel and

there exists any substantial doubt on the question of which shall apply, the protection of our country is far more important than the protection of the reputation of a public official or a person in public life." Id. at 496; accord Redding v. Carlton, 223 Pa.Super. 136, 141 n.4, 296 A.2d 880, --- (1972) (publication accusing township supervisor of having a conflict of interest because he owned land adjacent to a site proposed for development of a new township building, held not capable of defamatory meaning).

This court too demonstrated its dedication to the protection off speed in Redding, supra, when it stated, "in deciding whether or not a publication is defamatory, courts should be guided by America's profound 'commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

open, and that it may well include vehement caustic and sometimes unpleasant attacks on government and public officials.'" Redding at 139 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

My conclusion that the language in the present case is not capable of a defamatory meaning is not only mandated by Pennsylvania law, as set forth above, but is also consistent with the decision of the United States Supreme Court in Greenbelt Cooperative Publishing Assoc. v. Bresler, 398 U.S. 6, 26 L.Ed.2d 6, 90 S.Ct. 1537 (1970). In that case, a newspaper article related what went on at a public meeting at which a rezoning proposal was being hotly debated. The controversy revolved around a real estate developer/member of the Maryland House of Delegates who was concurrently negotiating with the city for the sale of a tract

of land that he owned, and for zoning variances he desired. The article fully discussed the meeting, disclosing that many opponents of the variances described the developer's negotiation tactics as "blackmail." Consequently, the developer sued for defamation claiming that the article "imputed" to him the crime of "blackmail." The Supreme Court ultimately affirmed the trial court's holding that the challenged communication was not capable of defamatory meaning.

In Greenbelt, the Court found that since the article was undisputedly truthful and accurate, no defamation case could be made in the ordinary sense of malicious publication of falsehood. See id. at 14. As to plaintiff's claim regarding the defamatory implications of the article, the Court stated, "the work 'blackmail' in these circumstances was not slander when spoken, and not libel

when reported." Id. Because the article concerned a subject of substantial concern to the community, the Court observed that,

> The Greenbelt News Review was performing its wholly legitimate function as a community newspaper when it published full reports of these debates in its news columns. If the reports had been truncated or distorted in such a way as to extract the word "blackmail" from the context in which it was used at the public meetings, this would be a different case. But the reports were accurate and full. ... To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments.

Id. at 14-15.

Similarly, in the case at bar, appellees were merely informing the community about recent developments in a matter of public concern. In so doing, as in Greenbelt, appellees reported

truthfully and accurately the results of Costopoulos' analysis of the Hubbard case; appellees did not "truncate" Costopoulos' report by providing conclusions alone without their bases, nor did appellees endorse the report's conclusions as valid.

Under the circumstances, anything other than a finding that the challenged publication is not capable of a defamatory meaning would silence the "marketplace of ideas" so fundamental to a democratic and free nation. Should the day come when the media cannot objectively inform the public of on-going investigations -- elected and appointed officials, where that conduct is a link in the criminal justice system we depend on to protect us, we will not longer have a government of checks and balances where the ultimate check is the watchful eye of the people governed.

II

It is well established under United States Constitutional doctrine, as well as Pennsylvania law, that in a defamation action based upon communications pertaining to matters of public concern, a plaintiff, as a predicate to recovery, must prove that the allegedly defamatory statements are false.[5] Philadelphia

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[5] The majority opinion rejects this argument as a grounds for granting summary judgment, because it finds that appellees have mischaracterized the burdens of proof. Conceding that defamation plaintiffs bear the burden of proving falsity, the majority pints out, however, that in a motion for summary judgment, the burden is first on the moving defendant to set forth evidence that to genuine issue of fact exists as to falsity, i.e, by producing evidence of truth; then in order to avoid summary judgment, the plaintiff must set forth contradictory evidence sufficient to show that there **does** exist a question of fact as to falsity. Thus, because the majority found that appellees did not set forth any evidence as to the **truth** of the alleged defamation, it rejected appellees' argument that appellant failed to meet his burden of proving falsity. This analysis would be correct had appellant's complaint included specific allegations

Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); Mathias v. Carpenter, 402 Pa.Super. 358, 587 A.2d 1 (1991); Dougherty v Boyertown Times, 547 A.2d 778 (Pa. Super. 1988); Bobb v. Kraybill, 511 A.2d 1379 (Pa. Super. 1986).

In Hepps, the United States Supreme Court is faced with the question whether or not the United States Constitution requires a private plaintiff, in an action concerning statements about public matters, to bear the burden of proving falsity. The Court recognized that since even private plaintiffs bear the burden

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of falsity -- that is, appellees could not then succeed by merely alleging the truth of the challenged statements without providing any evidence thereof. However, since appellant did not even allege specific statements as being false, thus failing to make a prima facie case of defamation, the primary burden of production cannot switch to the appellees in their motion for summary judgment. See Bobb v. Kraybill, infra.

of proving some degree of fault, the additional burden of proving falsity is not a significant one. Hepps, supra at 794 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974)). Furthermore, the Court asserted that while "there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is false ... [t]o ensure that true speech on matters of public concern is not deterred, we hold that the common law presumption that defamatory speech is false cannot stand." Id. at 792-3.

In Hepps, a case about private plaintiffs, the Court underscored that the burden of public plaintiffs as contrasted to private plaintiffs has been resolved and is not subject to further discussion.. The Court stated, "Our opinions to date have chiefly treated the necessary showing of fault rather than

falsity. Nonetheless, as one might expect given the language of the Court in New York Times, a public figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation." Id. at 792 (citations omitted) (quoting Garrison v. Louisiana, 379 U.S. 64, 74, 13 L.Ed.2d 125, ---, 85 S.Ct 209, --- (1964) ("a public official is allowed the civil [defamation] remedy only if he establishes that the utterance was false.")).

Even before Hepps, this Court had held that where matters of public concern are discussed in the allegedly defamatory material, a public figure plaintiff in a defamation action bears the burden of proving the falsity of the statements. Dunlap v. Philadelphia Newspapers, Inc., 448 A.2d 6 (Pa.Super. 1982); see also Bobb, supra. In Dunlap, this court did not need to determine whether the plain-

tiff was public or private because it held that in either case, where the matter discussed by the challenged statements was of public concern, the plaintiff must bear the burden of proving falsity. Dunlap, supra at 14.

Bobb v. Kraybill, a more recent Pennsylvania case regarding this issue, is particularly helpful in resolving the case at bar as the facts and procedural posture are similar. Bobb involved a defamation case commenced by a marketing manager with the Bureau of State Lotteries who claimed to have been defamed by two articles published and written by newspaper and reporter defendants, respectively. The articles in question set forth facts concerning plaintiff's brush with the law as a result of a personal loan from a lottery ticket sales agent, which loan he knew had been drawn from the agent's "winner's account." The

article revealed that plaintiff had consequently been fired from his job for "'misrepresentation of [his] position with the Bureau of Lotteries' in connection with the loan transaction". Bobb at 1380 (quoting the article).

As in the case at bar, there was no dispute as to the accuracy of the facts reported, but rather, plaintiff claimed that the article implicitly denoted him in a bad light. Further similarity of the two cases is evidenced by the fact that both articles attempt to balance their allegedly negative depictions by informing the reader that to the extent the article implies any criminal conduct by the plaintiff, the criminal justice system has not given credence to those allegations. In Bobb, the article told that the Attorney General's Office had "declined to prosecute appellant for lack of a clearly defined prosecutable crime."

Bobb at 1380. In the present case, Sarge's article acknowledges appellant's repeated affirmances by both state and federal courts.

In Bobb, the trial court, finding no genuine issue of material fact as to the falsity of the articles published, had granted summary judgment in favor of the defendants. On appeal, this court affirmed based upon a finding that "[t]he record shows that appellant was unable to specify **anything** reported that was misquoted or false." Id. at 1381. Furthermore, the court asserted the following:

> At his deposition, appellant's answers were evasive when asked what specific items in the articles were in dispute. In fact, each of appellant's contentions regarding the stories actually concern the appellee's degree of care in publishing the stories, which question is not germane to the resolution of this appeal in light of the truthfulness of the articles (whether defama-

> tory statements are made negligently or willfully, a civil action in libel is only actionable when the statements are false).

Id. (citations omitted).[6]

These same factors, which were the basis of the holding in Bobb, exist in the case at bar. Appellant's deposition failed to specify defamatory statements, see discussion supra at p.9, and with the exception of the empty allegation of falsity in his pleading, appellant's pleadings and affidavits focused exclusively on the appellees' state of mind in publishing the article. The trial court's opinion granting summary judgment

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[6] The majority attempts to distinguish Bobb by pointing out that the plaintiff admitted the truth of the statements and merely alleged that they put him in a negative light. I do not disagree with this characterization of Bobb, but I find that the same is true of appellant in the case at bar. He does not suggest that any statement of fact made by either Sarge or Costopoulos is false, but rather that the entire article is implicitly defamatory.

to appellees noted the following: "[N]either the article nor the report has been shown to contain allegedly false statements or to be false as a whole; further, there has been no suggestion that the documents upon which the defendant relied were false." In light of the foregoing discussion, we find that summary judgment in favor of appellees could have been granted on these grounds alone.[7]

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[7] Herein lies the reason that I have not addressed the trial court's determination that there was no genuine issue of fact as to actual malice. That is, in the defamation action where the alleged defamatory statements are of public concern, defendant's degree of fault, if any, is irrelevant unless and until the plaintiff sustains his or her burden of proving the falsity of the statements. See Bobb v. Kraybill, supra. In the case at bar, appellants failed to specify in what respects the challenged article was false. Instead, both the complaint and affidavits of appellant focused on establishing evidence of actual malice on the part of appellees. Consequently, in appellees' motion for summary judgment, in addition to arguing that there was no genuine issue of fact as to falsity,

appellants also pointed to contradicted oral testimony that Sarge had maintained a file of articles relating to the Hill case, and that he had used this file to write the article in question. On the basis of this evidence, appellees argued that as a matter of law, there existed no genuine issue of fact as to actual malice. The trial court granted summary judgment because it found no genuine issue of fact either as to falsity -- the ground upon which we affirm -- or as to actual malice. In reviewing the trial court's order, the majority opinion correctly took issue with the trial court's willingness to consider appellant's oral testimony as a basis for finding no genuine issue as to actual malice. If the existence of actual malice had been a determinative factor in the disposition of the motion, and if the existence of the reporter's file was determinative of appellees' state of mind, then under Nanty-Glo Borough v. American Surety Co., 309 Pa. 236 (1932), it would be error for the trial court to grant summary judgment to the movants solely on the basis of their own oral testimony. However, as discussed above, and in accordance with this court's decision in Bobb, I find that the question of actual malice need not and should not have been addressed in light of appellant's failure and refusal to sufficiently allege or prove the falsity of appellees' statements. Likewise, I do not address the merits of the trial court's conclusion that the file's existence is indicative of appellees' state of mind.

III

Finally, Pennsylvania law has long recognized the special privilege to be given to "pure" opinion. See Baker, supra; Dougherty, supra; Braig v. Field Communications, 310 Pa.Super. 569, 579, 456 A.2d 1366, 1372 (1983); Beckman v. Dunn, 276 Pa.Super. 527, 419 A.2d 583 (1980).

As early as 1980, this court acknowledged that "[o]pinion without more is not actionable as libel. The allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion." Beckman, supra, at 587 (citation omitted); see also Baker, supra.

In Dougherty, this court fully articulated the protection afforded to pure opinion:

Whether a particular statement constitutes a fact or an opinion is a question of law for the trial court to determine. Veno v. Meredith, 357 Pa.Super. 85, 92, 515 A.2d 571, 575 (1986) quoting Braig v. Field Communications, 310 Pa. Super. 569, 579, 456 A.2d 1366, 1372, (1983) cert. denied 466 U.S. 970, 104 S. Ct. 2341, 80 L. Ed.2d 816 (1984). In Braig this Court adopted Section 566 of the Restatement (Second) of Torts, supra, entitled Expression of Opinion, which provides as follows:

A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Comment (b) of Sec. 566 explains the two types of expression of opinion:

(1) The pure type -- which "occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character."

(2) The mixed type -- which "while an opinion in form or context, is apparently based on

facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication. Here the expression of opinion gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant."

Restatement (Second) of Torts, Sec. 566, comment (b). Comment (c) of Sec. 566 explains the constitutional significance of the distinction explained in Comment (b):

A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory

> opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.
>
> Restatement (Second) of Torts, sec. 566, comment (c).

Dougherty, supra at 476-477, 547 A.2d at 785.

In Milkovich v. Lorain Journal Co., 497 U.S. ---, 111 L.Ed.2d 1, 110 S.Ct. --- (1990), the United States Supreme Court addressed the question of whether or not "opinions" could be the basis for defamation actions, and rejected the argument that the First Amendment affords absolute protection to all statements classifiable as opinion. The Court cautioned that statements such as 'in my opinion, John Jones is a liar," "may often imply assertions of objective fact." Id. at 17.

Furthermore, the Court held that "[e]ven if the speaker states the facts

upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." Id. at 18. This language seems to indicate that where an opinion is based on true, disclosed, complete information, if that opinion itself is somehow "erroneous," it could still be the basis for recovery.[8] However, the dissent in Milkovich interprets the majority holding more narrowly, so that opinions which do not imply the existence of undisclosed defamatory facts are completely protected despite perhaps being mistaken.[9]

---

[8] In Milkovich the Court found that the challenged statements were based upon assertions capable of being proven false; thus, the Court did not actually have to apply this rule.

[9] The dissent in Milkovich noted the following:

[W]hile the Court today dispels

In Pennsylvania cases subsequent to Milkovich, this court's continued allegiance to the protection of pure opinion demonstrates an interpretation of the Milkovich majority opinion that is consistent with the dissent in that case. See Mathias, supra; see also Livingstone, supra.

In Mathias, for example, in support of a finding that a newspaper article was not capable of a defamatory meaning, this

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> any misimpression that there is a so-called opinion privilege **wholly in addition** to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by **existing** First Amendment doctrine. As the Court explains, "full constitutional protection" extends to matters of public concern "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual."

Milkovich, supra at 21 (Brennan and Marshall, JJ., dissenting) (quoting majority opinion) (emphasis in original).

Court quoted the same passage from Dougherty as is set forth supra at pp. 20-21. In Mathias, the Court explained that "all the facts upon which the author bases his opinion were disclosed.... The reader, therefore, was provided with adequate facts to assess the validity of the opinion expressed.... Under these circumstances, the expression of opinion was not actionable." Id. at 4.[10]

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[10] Compare Dunlap, supra, in which this court held that true statements of fact, as opposed to opinion, could be the basis for recovery if they implied defamatory facts proven false by the plaintiff. Concurring in the result only, I wrote the following:

> I would not permit a finding of falsity where a recipient could draw false inferences from statements which the plaintiff admitted true.
>
> The majority's holding too broadly restricts the press' freedom to publish comment and criticism on official conduct. Too stringent constraints may deter critics of official conduct "from voicing their criticism even though it is

I find that application of the above law to the case at bar provides further grounds upon which to affirm the trial court's order. This third ground is inextricably related to the first two.

In Part One I held that the challenged article was not capable of defamatory meaning because read in context, it does not "tend to blacken [appellant's] reputation...." There I adhered to the dictates of Pennsylvania law as well as First Amendment doctrine and refused to

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> believed to be true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They would tend to make only statements which 'steer far wider of the unlawful zone... .'" New York Times v. Sullivan, 376 U.S. 254, 279, 84 S. Ct. 710, 725, 11 L.Ed.2d 686 (1964) (citation omitted).

Dunlap, supra at 17 (Beck, J. dissenting). This same language, applied to statements reasonably understood as opinion, argues forcefully for continued adherence to the doctrine that pure opinion should be absolutely protected.

consider the article as anything more malignant than an objective reporting of historical fact, i.e.: that Costopoulos was hired to make a report, and the contents of that report.

In part three I hypothetically accept a contrary reading of the article whereby a reader would understand the article to endorse all of Costopoulos' conclusions. Viewing the article in this light, and addressing appellant's claim that the article implicitly accuses appellant of committing prosecutorial misconduct, I nevertheless find that the trial court neither abused its discretion nor committed an error of law in granting appellees' motion for summary judgment. I find that Sarge responsibly presents Costopoulos' conclusions as pure opinions, which do not imply the existence of any undisclosed defamatory facts, and therefore are not actionable.

The article includes a full discussion of the disputed issues upon which Costopoulos based his statement that the Hubbard's contentions of prosecutory manipulation and evidence tampering are meritorious. Furthermore, it cannot be argued that the printed opinions imply the existence of undisclosed defamatory facts. Costopoulos' own advice to the Hubbards that they should dig up more evidence clearly concedes that he has examined all the cards on the table and that they fall short of proving any unlawful conduct on the part of the prosecutor. Thus, it is unreasonable to suggest that a reader would nevertheless infer that more defamatory facts are known to Costopoulos but not included in the article. Consequently, I find that the article is pure opinion not capable of a defamatory meaning.

Finally, even under the narrow

reading of Milkovich, announced in the Milkovich dissent and adopted by this court, if the disclosed facts upon which an opinion is based can be proven false, then a court could find the opinion capable of a defamatory meaning. However, in the present case, as is discussed in part II of this opinion, plaintiff cannot avoid summary judgment because he has failed to even allege that any of the factual bases provided in the article were false.

Therefore, I would affirm the trial court's order of summary judgment.

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLEN E. ERTEL, Appellee	: Nos. 91 and 92 Eastern District Appeal Docket 1994
v.	: Appeal from the Order and Memorandum Opinion
THE PATRIOT-NEWS COMPANY, DICK SARGE, and WILLIAM C. COSTOPOULOS, Appellants	: of the Superior Court entered on November 17, 1992, at 1908 Philadelphia 1991, reversing the Order of the Court of Common Pleas of Philadelphia County, September Term, 1985, No. 2145.
	: ARGUED: October 23, 1995

OPINION OF THE COURT

MR. JUSTICE CAPPY:

DECIDED: April 17, 1996

These are appeals by allowance from the order of the Superior Court, reversing the entry of summary judgment by the Court of Common Pleas of Philadelphia County. For the reasons that follow, we now reverse.

The instant matter is a civil action for defamation filed by Appellee, Allen

E. Ertel ("Ertel"). This action has its origins in a news article published on June 30, 1985 by Appellant, the Patriot-News Company ("Patriot-News") concerning a prosecution conducted by Ertel while he was District Attorney for Lycoming County. This 1974 prosecution resulted in a conviction of Kim Lee Hubbard ("Hubbard") of second degree murder for the death of twelve-year-old Jennifer Hill. Hubbard served ten years in prison for the Hill murder.

Since being accused of the murder, Hubbard has steadfastly asserted his innocence. After Hubbard was released from prison, he and his parents hired Appellant William C. Costopoulos ("Costopoulos") to review the trial in an effort to clear Hubbard's name. Costopoulos studied the case and wrote a twenty-seven page report (the "Costopoulos Report"). He then submitted this

report to the Hubbards. The Hubbards, in turn, delivered a copy of the Costopoulos Report to Appellant, Dick Sarge ("Sarge"), a reporter for the Patriot-News who had written previous articles about the case. On June 30, 1985, an article written by Sarge about the Costopoulos Report (the "June 30th article") was published in the Harrisburg Sunday Patriot-News.

As reported in the June 30th article, the Costopoulos Report had noted evidentiary peculiarities and conflicts in the 1974 prosecution and had stated that there was "significant merit" to the Hubbards' claim of "a strong pattern of prosecutorial manipulation and/or tampering of evidence." (R. 354a). The June 30th article stated that the Costopoulos Report had found the following aberrations in the 1974 prosecution:

1. A tire cast was introduced

into evidence against Hubbard at the trial. Police said the cast was taken from the field near where the body was discovered, and that it matched a tire on Hubbard's car. Yet evidence established that the tire, which was on Hubbard's car when he was arrested, was purchased and installed after the murder. Moreover, the tire cast clearly reproduced lettering from the tire sidewall. A tire moving through a muddy field would not leave legible traces of sidewall lettering. From this, Costopoulos concluded that "[t]he only logical conclusion to be drawn is that [the tire cast in question] was fabricated." R.355a.

2. Different witnesses reported the body was found in different places in the farm field. One of the reported places was well away from the boot prints and the tire tracks which were the key pieces of evidence linking the crime to Hubbard. As reported in the June 30th article, Costopoulos believed that these inconsistencies made it possible that the tire and boot casts were fabricated. R. 354a-355a.

3. The Costopoulos report posited that "numerous discrepancies relative to the victim's clothing, together with the condition and location of the body, suggested that the

body itself was tampered with." (R. 355a).

The June 30th article also noted that the Hubbards' claims had been rejected in proceedings through the Supreme Court of Pennsylvania, the United States District Court for the Middle District of Pennsylvania, and the Third Circuit. (R. 354a). After reading the article, Ertel demanded and received from the Patriot-News an apology which was published in the July 7, 1985 edition of the Sunday Patriot-News.

Ertel subsequently filed suit against Costopoulos, Sarge and the Patriot-News for defamation based on the June 30th article.[1] (Hereafter, Sarge and the Patriot-News shall be collectively referred to as "the newspaper".)

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[1] Ertel's suit is based solely on the publication of the June 30th article, and is not based on Costopoulos' tendering of the report to the Hubbards.

The newspaper and Costopoulos moved for summary judgment. The trial court held that Ertel had not shown he could establish "actual malice" by clear and convincing evidence, and thus granted summary judgment in favor of the newspaper and Costopoulos. The trial court did not address the other arguments presented by the newspaper and Costopoulos to support their motion for summary judgment.

The Superior Court, in a memorandum opinion, addressed all claims raised by the newspaper and Costopoulos, and held that none of them justified the entry of summary judgment. Thus, it reversed the trial court and remanded. The newspaper and Costopoulos subsequently filed Petitions for Allowance of Appeal, both of which were granted by this Court.

Pennsylvania Rules of Civil Procedure Rule 1035 governs summary judgment,

and it states in pertinent part:

> (a) After the pleadings are closed, but within such times as not to delay trial, any party may move for summary judgment on the pleadings and any depositions, answers to interrogatories, admissions on file and supporting affidavits.
> (b) The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .
> (d) . . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Pa.R.C.P. No. 1035.

In reviewing this matter, as with

all summary judgment cases, we view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Pennsylvania State University v. County of Centre, 532 Pa. 142, 144-145, 615 A.2d 303, 304 (1992). In examining questions of law, our scope of review is plenary. See Phillips v. A-BEST Products Co., ____ Pa. ____, ____, 665 A.2d 1167, 1170 (1995).

Before turning to the particulars of each appeal, we must first examine the law of defamation as it applies to public figures[2] to determine whether the trial court's entry of summary judgment in favor of the newspaper was correct.

It is axiomatic that the United

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[2] Ertel concedes he is a public figure. Complaint, ¶ 6 and Appellee's Brief at 23.

States Constitution dictates that certain limits be placed on "a State's power to award damages in a libel action brought by a public official against critics of his official conduct" in order to secure the freedom of speech guaranteed by the First Amendment. See New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964). Thus, it is the burden of a public figure plaintiff, such as Ertel, to show that the statements at issue are false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1987). The Court reasoned that although "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so," this result was justifiable since placing the burden on media defendants to prove truth would create fear of liability and deter free speech. Id. at 777-778.

In addition to establishing that the

statement was false, the public figure plaintiff must also establish that the defendant published the statement with "actual malice," or in other words, published the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 279-280.

As its first issue, the newspaper raises the claim that it is entitled to summary judgment because there was no genuine issue of material fact as to whether the June 30th article was false. The newspaper argues that since Ertel offered no evidence that any of the material was false, an issue on which Ertel bore the burden of proof, then there was no genuine issue of material fact and the newspaper was entitled to judgment as a matter of law.

The Superior Court below rejected the newspaper's claim. The Superior

Court held that the newspaper, as the moving party, was obliged to submit evidence that the claimed defamatory material was true, even though the newspaper had no such obligation at trial. See Super. Ct. slip op. at 34. The Superior Court held that in the absence of the newspaper introducing any such evidence, Ertel had no obligation to introduce any evidence concerning its falsity. Employing this standard, the Superior Court concluded that since the newspaper failed to produce evidence to show that the material at issue was true, then Ertel had no obligation to offer even a scintilla of evidence of falsity to withstand the motion for summary judgment.

The Superior Court's decision is inconsistent with the language and purpose of our summary judgment rule. Rule 1035 does not require that the moving

party introduce evidence on an issue on which it does not bear the burden of proof in order to have its motion granted. Additionally, the rule explicitly states that a non-moving party may not avoid summary judgment by "rest[ing] upon the mere allegations or denials of his pleading . . . ." See Pa.R.C.P. No. 1035(d).

Allowing non-moving parties to avoid summary judgment where they have no evidence to support an issue on which they bear the burden of proof runs contrary to the spirit of Rule 1035. We have stated that the "mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial." Curran v. Philadelphia Newspapers, Inc., 497 Pa. 163, 176, 439 A.2d 652, 658 (1981) (citations omitted). We have a summary judgment

rule in this Commonwealth in order to dispense with a trial of a case (or, in some matters, issues in a case) where a party lacks the beginnings of evidence to establish or contest a material issue. The Superior Court's decision does not advance this goal. Forcing parties to go to trial on a meritless claim under the guise of effectuating the summary judgment rule is a perversion of that rule.[3]

We also find it instructive to reference the United States Supreme

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[3] We note that our rule governing summary judgment has been recently amended. Among other changes, the new Rule 1035 states that a party may move for summary judgment where "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa.R.C.P. No. 1035.2. Order amending Rule 1035 promulgated February 5, 1996; amendments effective July 1, 1996.

Our holding in the matter sub judice is consistent with the amended Rule 1035.

Court's interpretations of Fed.R.Civ.P. 56, a provision which Rule 1035 closely tracks.[4] The United States Supreme Court has held that where the non-moving party fails to adduce sufficient evidence to establish the existence of an element essential to his case and on which he bears the burden of proof, then the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The Court specifically noted that there is no express or implied requirement in Fed.R.Civ.P. 56 which requires a moving party to negate elements of the non-moving party's case

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[4] The Superior Court also noted that it was helpful to look to the federal courts' interpretation of F.R.C.P. 56 in interpreting Pa.R.C.P. No. 1035. The Superior Court, however, failed to realize that the federal district court case on which it relied was effectively overruled by the U.S. Supreme Court a decade ago in the cases of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986), which are discussed infra.

prior to the non-moving party being required to introduce evidence. See also Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986) ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.")

We find the reasoning of the United States Supreme Court to be persuasive, and therefore adopt it. Thus, we hold that a non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

In applying this legal standard to the newspaper's claim, we must examine whether Ertel has produced evidence

sufficient to show that there is genuine issue of material fact as to the issue of falsity, such that the newspaper is not entitled to a judgment as a matter of law. Ertel did not offer evidence that any of the material at issue was false. His complaint failed even to allege that any specific statement in the June 30th article was false. Because Ertel did not produce any evidence of falsity, there was no genuine issue of material fact regarding falsity. Therefore, the newspaper was entitled to summary judgment as a matter of law.[5]

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[5] We also note that in its argument relating to summary judgment on the issue of falsity, the newspaper contended that placing the burden on the defendant to prove truth in a public figure defamation case ran afoul of Hepps, supra, and was therefore unconstitutional. Because we have determined that the Superior Court's holding was in violation of Pa.R.C.P. No. 1035, we need not determine whether it was also unconstitutional. See Rescue Army v. Municipal Court, 331 U.S. 549, 568-569 (1947) (courts should avoid constitutional issues when the issue at

As we find that the newspaper was entitled to have its summary judgment motion granted, there is no need to analyze the newspaper's alternative arguments supporting its claim for relief.

Now turning to the action against Costopoulos, we must address an additional area of the law of defamation. As his first issue, Costopoulos claims that the Superior Court erred when it reasoned that Costopoulos could be held liable as a "procurer" of the publication of the June 30th article.

This issue concerns an aspect of defamation law which this Court has rarely encountered. Ordinarily, a plaintiff in a defamation case must prove that the defendant actually published the defamatory material. See Gaetano v.

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hand may be decided upon other grounds.)

Sharon Herald Co., 426 Pa. 172, 182, 231 A.2d 753, 755 (1967); 42 Pa.C.S. §8343(a)(2). In this matter, however, Ertel does not allege that Costopoulos actually published the June 30th article.[6] Rather, Costopoulos is alleged to be culpable because he "procured" the publication of Sarge's article by the Patriot-News. See Restatement (Second) of Torts, §577, cmt. f (even though a defendant is not the publisher of the allegedly defamatory publication, he may be liable in defamation if he "procured" the publication.)

This Court has not visited the issue of liability of third parties for defamation for more than a century. Henry v. Pittsburgh L.E.R. Co., 139 Pa. 289, 297,

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[6] As discussed at n.1, supra, Ertel's suit was based solely on the publication of the June 30th article, and not on the transmission of the Costopoulos Report to the Hubbards.

21 A. 157, ____ (1891) held that even if the defendants furnished all of the information on which the defamatory newspaper article was based, there was no evidence that they procured its publication in the sense that they directed publication of the article. Id. at 297-298, 21 A. at ____.

Our sister state of West Virginia has examined this issue more recently, and the opinion from her highest court is in accord with our Henry decision. The West Virginia Supreme Court held that "alleged procurers or assistants are not responsible as publishers of libel absent a showing of their participation or involvement in the publication." Crain v. Lightner, 178 W.Va. 765, 773, 364 S.E. 2d 778, 786 (1987).

We hold that in order to show that a defendant "procured" publication, the plaintiff must establish that the third

party-defendant directed or participated in the publication of the defamatory publication by another. To find that a defendant "directed" or "participated in" publication requires, at very least, evidence of some affirmative action on the part of the defendant.

In support of his position, Ertel asserts that there is evidence that Costopoulos procured the June 30th publication. He points to Sarge's statement that after he received the opinion letter from the Hubbards, Sarge called Costopoulos for comment. In asking Costopoulos whether Sarge could publish the report, Sarge said that Costopoulos replied "I don't care what you do with it." Deposition of Sarge, Vol I, p. 36 (R. 623a). Sarge immediately followed that statement by adding, "That could have meant anything. But it also didn't say -- he didn't say don't print it."

Id. Costopoulos does not contend that this statement by Sarge is an inaccurate account of his conversation with him. Ertel does not point to any other evidence of procurement.

As noted above, Pa.R.C.P. No. 1035 declares that entry of summary judgment in favor of Costopoulos would be appropriate where there exists no genuine issue as to a material fact and Costopoulos is entitled to judgment as a matter of law. First, since Costopoulos agrees with Ertel's account of Sarge's statement, there is no issue of fact. Second, Costopoulos is entitled to judgment as a matter of law. Taking Sarge's statement in the light most favorable to Ertel as the non-moving party, this evidence at best shows that Costopoulos did not act to prevent Sarge from writing his article, and the Patriot-News from publishing it. This evidence is insuffi-

cient as a matter of law to show that Costopoulos procured the publication of the June 30th article. Costopoulos did not affirmatively act to direct or participate in the publication of the June 30th article; rather, he merely failed to hinder its publication. Thus, the entry of summary judgment in favor of Costopoulos by the trial court was correct, and the Superior Court erred in reversing that determination.

Because we have determined that Costopoulos is entitled to the relief he requested as Ertel failed to introduce evidence sufficient to establish that Costopoulos procured the publication, then there is no need for us to analyze Costopoulos' claims in the alternative.

For the reasons set forth herein, the Order of the Superior Court is reversed.

Mr. Justice Montemuro, who was

sitting by designation, did not participate in the decision of this case.

Judgment entered
Dated: April 17, 1996

Charles W. Johns /s/
Charles W. Johns, Esquire
Prothonotary

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLEN E. ERTEL,	:	No. 91 E.D. Appeal Docket 1994
Appellee	:	No. 92 E.D. Appeal Docket 1994
v.	:	
THE PATRIOT-NEWS COMPANY, DICK SARGE, and WILLIAM C. COSTOPOULOS,	:	Application for Reargument
Appellants	:	

O R D E R

PER CURIAM:

AND NOW, this 26th day of June, 1996, the Application for Reargument is hereby DENIED.

TRUE COPY FROM THE RECORD
ATTEST: June 26, 1996

John W. Person, Jr. /s/
JOHN W. PERSON, JR.
Deputy Prothonotary
Supreme Court of Pennsylvania
Eastern District

APPENDIX E

[J-156-95]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 91 and 92
Eastern District Appeal Docket 1994

ALLEN E. ERTEL,

Appellee

v.

THE PATRIOT-NEWS COMPANY,
DICK SARGE, and WILLIAM C. COSTOPOULOS,

Appellants

APPLICATION FOR REARGUMENT

Appeal from the Order and Memorandum Opinion of the Superior Court entered on November 17, 1992, at 1908 Philadelphia 1991, reversing the Order of the Court of Common Pleas of Philadelphia County, September Term, 1985, No. 2145

ARGUED: October 23, 1995

John C. Youngman, Jr.,
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Appellee

TABLE OF CITATIONS

CASES	PAGE
Marks v. Tasmin, 527 Pa. 135, 389 A2d 205, 206 (1991)	6
Milkovich v. Lorain Journal Co., 497 U.S. ____, 110 SCt. 2695, 2706	6

Appellee, in the above-captioned matter, applies for reargument after the entry of the Order of April 17, 1996, for the following reasons:

1. The Court misapprehended or did not consider the facts set forth in Appellee's Brief constituting falsity as follows:

A. The Complaint, affidavited, of Appellee, Paragraphs 11 through 15, herein set forth. (R-23A through R-25A, inclusive)

> "11. The aforesaid Exhibit "A" was false, malicious and reckless in that it implied that Plaintiff, as District Attorney of Lycoming County, in prosecuting Kim Hubbard for murder:
>
> a. had knowingly procured perjured testimony to prove his case;
>
> b. had knowingly fabricated evidence in connection with the case;
>
> c. had prosecuted Kim Hubbard for reasons other than the crime for which Hubbard was

charged;

d. had knowingly conducted a strong pattern of prosecutorial manipulation and tampering of evidence;

e. had knowingly prosecuted an innocent person and let the killer go free;

f. had otherwise acted improperly in conducting the case;

g. such other reasons as will appear in discovery taken in this case.

12. The aforesaid Exhibit "A" and the actions of Defendants were false, malicious and reckless in that they:

a. implied that an exhaustive study had been undertaken in preparing the report on which it was based;

b. implied that Plaintiff had been interviewed for the article and quoted Plaintiff as if he had been interviewed for the article when Plaintiff was never interviewed for the article;

c. implied that Plaintiff used the case to run for political office;

d. such other reasons as will appear upon discovery

taken in this case.

13. Upon information and belief, the Defendants intend to preclude Plaintiff from public service and to harm him in his legal practice.

14. Upon information and belief Defendants intended and did inflict great mental distress upon Plaintiff and his family.

15. Defendants' actions and failures to act exhibited a reckless indifference to the truth and to the rights of Plaintiff entitling him to punitive and exemplary damages as well as compensatory damages."

(Exhibit "A" was the article first printed by the Patriot News Company on June 30, 1985.)

B. The Affidavit of Allen E. Ertel in its entirety (R-603A through R-608A, inclusive) and particularly paragraphs 5, 6, 12 and 13, thereof, set forth herein, verbatim:

"5. At this conference, even though Mr. John Sullivan, attorney for the Patriot News, refused to allow either Mr. Young or Mr. Sarge to be placed

under oath before the Court Reporter to give a statement as to the publishing and the background of obtaining material for this article, Mr. Young indicated that this article did not meet their journalistic standards. In fact in a previous telephone conference, Mr. Young stated emphatically that he would not rely on Mr. Costopoulos' word for any article; i.e. he was unbelievable. In addition Mr. Sarge indicated that he had never spoken to me in over 5 years concerning this case. The quotes that were contained in the alleged article, which appeared to be recent quotes, had not been obtained from me. Although Mr. Sarge indicated that these quotes were attributable to me approximately 5 years earlier, I do not have any recollection of making any such quotes nor having discussed this matter with Mr. Sarge at that time. in addition the article makes the quotes appear as if they had been given within the preceding week to two weeks prior to the publication of this article, which Mr. Sarge admitted was not true. In fact Mr. Sarge admitted this to Mr. Young.

6. At that conference, Mr. Sarge indicated that he knew that similar type allegations had been made against the police officers previously and

that these allegations had resulted in a libel suit against Mr. John Felix by the police officers involved. He also acknowledged that he knew that lawsuit had been settled with the defendant paying certain sums to the plaintiff after an extended course of time while that case had gone up on appeal and been remanded. Mr. Sarge acknowledged at that conference that he did not believe that I had done anything deliberately to tamper with the evidence in this case. On pointing out to him that the allegations in the article implied that I had tampered with the evidence, Mr. Sarge denied that the article had such implications. Further he stated that he did not believe that I had tampered with any evidence in this case and that I had a good reputation for honesty and credibility.

12. At the time of the publishing of the article which is in question in this suit, the Patriot News, through its reporter, Dick Sarge knew that the allegations therein in regard to Allen E. Ertel were not true. This is by his own admission. In addition, in discussing this matter with mr. Henry Young, Executive Editor of the Harrisburg Patriot News, he personally told Allen E. Ertel that he did not believe that Allen Ertel would con-

> sciously do anything to tamper with or lie in a lawsuit. He indicated that my reputation was impeccable and if the Harrisburg Patriot News published anything to the contrary, the Patriot NEws would have been incorrect. At the time when he indicated this to me, he had not read the article in question which had appeared in the patriot News. On the other hand, when Dick Sarge made these statements to me, he had already published this article in the Harrisburg Patriot News.
>
> 13. Mr. Henry Young told me that William Costopoulos was not reliable and a newspaper could not rely on him for accurate information. Mr. Young, by implication, certainly believed that relying on Mr. Costopoulos was reckless or wantonly reckless conduct."

C. The article of July 7, 1985, containing admissions by the Patriot News Company: (a) that they retracted any and all implications that Allen Ertel acted improperly when he prosecuted Kim Lee Hubbard and apologized for any inference that Ertel acted improperly; (b) that all Courts reviewing the matter had "com-

pletely rejected without merit the Hubbard family's contention that the evidence was in any way the product of 'manipulation and/or tampering'" (R-572A); (c) that the article was based solely on the legal memorandum prepared by Defendant Costopoulos; and (d) that Ertel was not interviewed for the article. It is submitted that this is evidence from which a fact finder could find that the article was false as a whole.

D. The Opinion of the Court, filed on April 17, 1996, did not deal with the above facts, nor did it suggest why the evidence which was set forth in the Brief before the Supreme Court at Pages 25 through 28, inclusive, and 30 through 32, inclusive, could not be considered by a fact finder on the question of falsity of the article as a whole.

E. The testimony of the Defendant

Sarge in the deposition of the Defendant Sarge, under oath, that he did not believe that Ertel had either fabricated evidence or tampered with evidence. (R-632A, R-633A)

F. The tampering with evidence or fabricating evidence constitute crimes under Pennsylvania law.

G. A reader of the article of June 30, 1985 could reasonably infer that the article implicitly accused Plaintiff Ertel of fabrication of evidence and tampering with and/or manipulation of evidence.

H. Rule 1035(b) of the Pennsylvania Rules of Civil Procedure provides that summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material of fact

and that the moving party is entitled to a judgment as a matter of law." Thus, at the relevant time period of this case, there are two requirements for summary judgment insofar as the moving party is concerned: (1) a showing that there is no material issue of fact; and (2) that he is entitled to judgment as a matter of law. The Court has overlooked the fact that in the case at bar, there was no request for summary judgment on the ground that there was no material issue of fact as to falsity of the article as a whole.

I. The Court has overlooked the controlling case of **Marks v. Tasmin**, 527 Pa. 135, 389 A2d 205, 206 (1991) in that the moving party has the burden of proving the nonexistence of a genuine issue of material fact.

J. The Court has overlooked that the basis for its decision in this matter

in enunciating a rule respecting moving for summary judgment, which has not yet taken effect, raises the issues of the denial of Plaintiff's right without due process and without the equal protection of the law.

K. The Court failed to consider the United States Supreme Court case of **Milkovich v. Lorain Journal Co.**, 497 U.S. ____, 110 SCt. 2695, 2706, that the implications of an article can make it false as a whole and that if it is false as a whole, it can be false and therefore libelous.

L. No falsity, as such, was argued in the lower court in this case, thus depriving Appellee of due process and equal protection of the law.

M. The Supreme Court of Pennsylvania is making an entirely new test for proving falsity not made or sanctioned by the Supreme Court of the United States.

Respectfully submitted,

CANDOR, YOUNGMAN, GIBSON & GAULT

By John C. Youngman, Jr. /s/
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Attorneys for Appellee

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Exhibit A

See Opinion of Justice Cappy - Appendix C, herein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of May, 1990, a true and correct copy of the within Application for Reargument has been served by First Class, U. S. Mail, postage prepaid, on the following:

David H. Marion, Esquire
Jeremy D. Mishkin, Esquire
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ATTORNEY FOR DICK SARGE AND THE PATRIOT NEWS

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ATTORNEYS FOR DEFENDANT COSTOPOULOS

John C. Youngman, Jr. /s/
John C. Youngman, Jr., Esquire

APPENDIX F

Control No. 102365

PHILADELPHIA COUNTY COURT OF COMMON PLEAS
MOTION COURT COVER SHEET

ALLEN E. ERTEL	SEPTEMBER TERM, 1985
vs.	
THE PATRIOT NEWS CO., DICK SARGE and WILLIAM COSTOPOULOS	NO. 2145

FILING OF: Responding Party: Plaintiff Allen E. Ertel

TYPE OF FILING	BRIEF OF PLAINTIFF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS THE PATRIOT-NEWS CO. AND DICK SARGE
OTHER PARTIES	John C. Sullivan, Esquire 122 Market Street, P.O. Box 840 Harrisburg, PA 17108-0840 (717) 236-3010 Attorney for Dick Sarge and The Patriot News Thomas J. Ziomek, Esquire Gregory S. Warner, Esquire WHITE & WILLIAMS 1234 Market Street 17th Floor

Philadelphia, PA
19107
(215) 854-7076
Attorneys for
Defendant
Costopoulos

CASE STATUS	This case has been assigned to Judge D'Alessandro. It has never appeared on a trial list and is not an arbitration case. Discovery Motions have been decided by Judge Hill and Avillino. Motion on Preliminary Objections, Judge DeBona.
CERTIFICATION PURSUANT TO CIVIL RULE 140(J)	Not Applicable
DATE OF FILING	December 8, 1988
DATE RESPONSE DUE	

CANDOR, YOUNGMAN, GIBSON & GAULT

By John C. Youngman, Jr. /s/
John C. Youngman, Jr.,
I.D. No. 07582
Attorneys for Plaintiff

ALLEN E. ERTEL, R.D. 2, Montoursville, PA 17701,	THIS IS NOT AN ARBITRATION CASE
Plaintiff	JURY TRIAL DEMANDED
vs.	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
THE PATRIOT-NEWS CO., 812 Market Street, Harrisburg, PA 17701, DICK SARGE, 812 Market Street, Harrisburg, PA 17701, WILLIAM COSTOPOULOS, Kollas, Costopoulos & Foster, 831 Market Street, P.O. Box 222, Lemoyne, PA 17043	CIVIL ACTION - LAW No.: 2145, September Term, 1985
Defendants	

BRIEF OF PLAINTIFF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS THE PATRIOT-NEWS CO. AND DICK SARGE

COUNTER-HISTORY OF THE CASE

Plaintiff filed a Praecipe for Writ of Summons in this matter on September 12, 1985, and filed his Complaint on January 14, 1986. The depositions of Plaintiff and Defendant Costopoulos have already been taken. In addition, Joseph Hubbard, the father of Kim Hubbard, has produced several hundred documents for

Plaintiff. The depositions of Defendants Sarge and the Patriot-News remain to be taken. Mr. Hubbard produced inter alia the so-called "Costopoulos Report" for the first time in March of 1988. The Defendants had consistently failed to produce this report upon request for production of documents, although both Defendants were in possession of a copy of the report prior to the beginning of this case. On October 28, 1988, Defendant Costopoulos filed his Motion for Summary Judgment in this matter and an extension of time was obtained from the attorney for Defendant Costopoulos to file this responsive brief on or before December, 1988. Concurrent with his Motion for Summary Judgment, Defendant Costopoulos filed his brief in support of said motion. Defendant Costopoulos makes three substantive arguments in support of his Motion for Summary Judgment under

Pa.R.C.P. 1035. These arguments are:

1. Defendant Costopoulos is immune from liability because he was absolutely privileged to publish the allegedly defamatory matter.

2. The Costopoulos report lacks his opinion on disclosed facts, and is, therefore not actionable.

3. Costopoulos was conditionally privileged to communicate his report, and there is no evidence that this privilege was abused.

These three arguments assume the defamatory nature of the "Costopoulos Report" and of the newspaper article of June 30, 1985.

Defendant Costopoulos also argues in his brief that procedurally and substantively the standard for summary judgment

in Pennsylvania pursuant to Pa.R.C.P. 1035 is thee same as the standard under F.R.C.P. 56.

Defendant Costopoulos attached nine (9) exhibits to his brief. These exhibits are:

1. The Complaint filed in this matter.

2. The answers of Plaintiff to Defendant Costopoulos' First Set of Interrogatories filed February 19, 1987.

3. The Affidavit of Defendant William Costopoulos.

4. The Costopoulos Report, a twenty-six page document.

5. Pages 36 through 46, inclusive, of the deposition of Defendant Costopoulos.

6. Plaintiff's Request for Production of Documents and

Defendant Costopoulos' response thereto. The Request for Production of Documents was served on Defendant Costopoulos on November 27, 1985.

7. The Order of Court denying Plaintiff's Motion to Compel Production of Documents.

8. The letter of enclosure of the Costopoulos Report from the attorney for Costopoulos to the attorney for Plaintiff dated March 9, 1988.

9. Pages 33 through 39 and Pages 46 through 48 of the deposition of Plaintiff taken on July 17, 1987.

This Brief will deal seriatim with the arguments made by Defendant Costopoulos. In addition, this Brief will append the following additional exhibits:

1. Affidavit of Plain-

tiff.

2. Article of Defendant Patriot-News written by Defendant Sarge and published in the Sunday Patriot-News on June 30, 1985.

3. Article of Defendant Patriot-News published on July 7, 1985, apologizing to Plaintiff for what appeared in the article of June 30, 1985.

On or about October 31, 1988, Defendant Sarge and The Patriot-News Co., by their counsel, filed a Motion for Summary Judgment. Appended to this Brief was the Affidavit of Defendant Sarge, which detailed his involvement with the Hubbard case and which the final two pages of this Affidavit are reproduced here for the Court's reference.

> "Except for information that in 1983 Kim Hubbard, after serving ten years of his 10-20

year sentence, was paroled from the State Correctional Institution at Dallas, nothing involving the Hubbards came across my desk until about June 19, 1985 when I received a telephone call from Joe Hubbard, father of Kim Hubbard, who advised me that he had employed Costopoulos to review the court records and other documents in the case and advise the Hubbards as what other avenues are open to them in their efforts to clear their son's name. Hubbard advised me that Costopoulos had written an analysis and opinion whereby he, Costopoulos, had concluded that Kim Hubbard could not have done the slaying if all the research done by Hubbard is true and valid.

Hubbard came into our office and gave me a copy of the Costopoulos opinion (Exhibit no 24) and advised me that he could publish excerpts from it. The opinion consists of 27 pages of a detailed analysis of court transcripts, trial evidence, and legal principals, and concludes with the opinion:

'...and it is our legal opinion that the Hubbards can currently expect no positive result from a criminal justice system which has served them so poorly in the past. Accordingly, their resources are most usefully directed toward additional

investigation.'

The Costopoulos opinion was logical and well documented. More importantly it was a more detailed legal analysis of the same evidentiary issues first raised in 1974 by defense counsel John Felix before the Lycoming County Court, and repeated by Peter Campana in 1977 before the Pennsylvania Supreme Court.

After I confirmed by telephone with Mr. Costopoulos that he had in fact written the analysis/opinion and reviewing my Hubbard file, I wrote the June 30, 1985 article (Exhibit no. 25), believing that Costopoulos' analysis of the Hubbard case and his concluding opinion that the criminal justice system had broken down were sufficiently significant to put before our readers. I believed that Costopoulos' expertise in the area of criminal justice was an authoritative voice to add to the now lengthy public discussion of the Hubbard trial. I did not believe then, nor do I believe now, that anything false appeared in the article, as the critical points of the disputed article (Exhibit no. 25) had all been published before by the Williamsport Grit and the Williamsport Sun-Gazette and the Weekender magazines in addition to prior issues of The

> Patriot and Evening News, all without refutation from Mr. Ertel. I truly believed when I wrote the June 30, 1985 article that Costopoulos' critical opinion and comments went to the criminal justice system, not to any individual in particular. The fact that Mr. Ertel was a principal in the criminal system as it involved the Kim Hubbard trial was just that: a fact. His presence- while it made the article more newsworthy because of the high political positions he had held or contended for - was not the motivation."

The Brief makes two arguments; one, that there was no actual malice present in the case and, two, that the article was protected because all that it expressed was opinion.

COUNTER-STATEMENT OF FACTS

The Complaint filed in this matter alleges the following:

> "5. The Patriot-News Co. publishes the newspaper known as the Sunday Patriot-News and upon information and belief circulates the same and did on or about June 30, 1985 circulate the same in Philadelphia County, Pennsylvania.

"6. Upon information and belief, Defendant, Dick Sarge, did write, aided and abetted by other members of the Patriot-News Co. staff, an article in the Sunday Patriot-News published June 30, 1985, the contents of which maliciously and recklessly libeled and defamed Plaintiff causing him great damage to his reputation as a public servant and as a lawyer.

"7. At all relevant times, Defendant, Dick Sarge, and others on the Patriot-News Co. staff were the agents, servants, workmen and employees of the Patriot-News Co.

"8. The aforesaid newspaper article is attached hereto and made a part hereof and termed Plaintiff's Exhibit "A".

"9. Upon information and belief, the aforesaid Exhibit "A" was recklessly and maliciously instigated, abetted and procured by William C. Costopoulos.

"10. Exhibit "A" and the Defendants falsely, maliciously, recklessly and without probable cause libeled and defamed Plaintiff.

"11. The aforesaid Exhibit "A" was false, mali-

cious and reckless in that it implied that Plaintiff, as District Attorney of Lycoming County, in prosecuting Kim Hubbard for murder:

"a. had knowingly procured perjured testimony to prove his case;

"b. had knowingly fabricated evidence in connection with the case;

"c. had prosecuted Kim Hubbard for reasons other than the crime for which Hubbard was charged;

"d. had knowingly conducted a strong pattern of prosecutorial manipulation and tampering of evidence;

"e. had knowingly prosecuted an innocent person and let the killer go free;

"f. had otherwise acted improperly in conducting the case;

"g. such other reasons as will appear in discovery taken in this case.

"12. The aforesaid Exhibit "A" and the actions of Defendants were false, malicious and reckless in that they:

"a. implied that an

exhaustive study had been undertaken in preparing the report on which it was based;

"b. implied that Plaintiff had been interviewed for the article and quoted Plaintiff as if he had been interviewed for the article when Plaintiff was never interviewed for the article;

"c. implied that Plaintiff used thee case to run for political office;

"d. such other reasons as will appear upon discovery taken in this case.

"13. Upon information and belief, the Defendants intended to preclude Plaintiff from public service and to harm him in his legal practice.

"14. Upon information and belief Defendants intended and did inflict great mental distress upon Plaintiff and his family.

"15. Defendants' actions and failures to act exhibited a reckless indifference to the truth and to the rights of Plaintiff entitling him to punitive and exemplary damages as well as compensatory damages."

The article (Exhibit "A" of the

Complaint) is repeated here verbatim in its entirety. The repetition is done so that the confusion indicated by the Exhibit "A" attached to this Brief by Defendant regarding the exact position of the wording of the article is made clear.

> "A prominent Harrisburg-area defense attorney has reviewed a 1974 Lycoming County murder trial and concluded that the claim of the convicted defendant's family 'of a strong pattern of prosecutorial manipulation and/or tampering of evidence has significant merit.'
>
> "Attorney William C. Costopoulos was retained by Joseph Hubbard of South Williamsport to review the trial of his son, Kim Lee Hubbard, which resulted in the younger Hubbard's conviction of second-degree murder on March 1, 1974, after a jury trial before Judge Charles F. Greevy.
>
> "After an 'exhaustive study,' Costopoulos wrote that while 'the impact of that pattern on the culpability of Kim Lee Hubbard is inconclusive . . . at the same time and without contradiction, gross inconsistencies in evidence presented by the prosecution cast a

reasonable doubt on the question of Kim Lee Hubbard's guilt.'

"HUBBARD, THEN 20, was arrested Nov. 17, 1973, and charged with the Oct. 19, 1973, strangulation death of Jennifer Hill, 12, a friend of Hubbard's sister, Ruth.

"The former U.S. Marine was paroled on Nov. 18, 1983, after serving 10 years and one day of a 10- to 20-year sentence in the State Correctional Institution at Dallas, Luzerne County. He now works with his father in the home-improvement business.

"Hubbard was prosecuted by the then-Lycoming County District Attorney Allen E. Ertel, who was the successful candidate in 1976 to represent the 17th district in the U.S. House of Representatives. Ertel was narrowly defeated for governor in 1982 by Gov. Dick Thornburgh and also lost a close race for attorney general in 1984 to LeRoy S. Zimmerman, the incumbent.

"QUESTIONED AT one point about Joseph Hubbard's continuing insistence that his son is innocent, Ertel said he did not feel that the prosecution's case was presented improperly. 'In my mind, I never prosecuted anybody I didn't think was guilty,' he said.

"For the past 11 years, Joseph and Dorisann Hubbard, the younger Hubbard's parents, have unrelentingly sought a new trial through a number of appeals, claiming the proceedings against their son were faulty. A 'charade' and a 'circus,' Hubbard said last week in describing the prosecution's tactics.

"But their appeals have been rejected in judicial proceedings through the state Supreme Court, U.S. Middle District Court and the U.S. Third Circuit Court of Appeals. Most recently, a Hubbard petition under the Post-Conviction Hearing Act was dismissed without a hearing on Jan. 7, 1982, by Judge Robert J. Wollet in Lycoming County Court.

"THE HUBBARDS also asked the state attorney general's office and the FBI to examine the case, but were rebuffed.

"Still seeking to clear the family's name and still digging for new evidence, Joseph Hubbard several months ago asked Costopoulos to analyze the case and recommend a course of action.

The Lemoyne-based lawyer concentrated his attention on what he called five areas of disputed evidence. They were

the condition of the victim's body when found Oct. 28, 1973, the body's location in a South Williamsport cornfield, tire casts presented as evidence that Hubbard's car was driven on a lane through the field, casts of boot prints said to have been made by Hubbard and said to have been found beneath the body and the victim's clothing.

"THE HUBBARDS have long contended the girl's body was refrigerated between her death and the discovery of the body nine days later, and say they now have witnesses who will testify on the subject. Their suspicions were aroused first when Mrs. Hubbard attended an open-casket viewing of the victim and noted the excellent condition of the girl's body. Subsequently, a pathologist and an embalmer told investigators that the victim could not have remained in the field for that period of time.

"Costopoulos wrote: '. . . if the body was not in the field for nine days, then it was refrigerated. And if it was refrigerated, another person or persons dumped the body in the cornfield shortly before Oct. 28 for it to be "discovered." . . . The events of the murder of Jennifer Hill did not take place the way the prosecution asserted they took place be-

cause it is a medical and scientific impossibility for an unrefrigerated nine-day-old body lying in a cornfield in 50-degree dry weather to appear "fresh" upon discovery.'

"This discrepancy, in Costopoulos' judgment, 'is a fatal weakness in the prosecution's case.'

"COSTOPOULOS ALSO examined conflicting testimony of witnesses on precisely where in the cornfield the body was found. There were two contradictory locations. The first was where a Civil Air Patrol officer testified he first discovered the body, about 27 feet from Sylvan Dell Road lying between parallel rows of corn. The second, where the casts of tires in the lane and boot prints under the body were made, was 127 1/2 feet from Sylvan Dell Road, with the body lying across the rows of corn.

"This conflicting testimony and other evidence that there were two different locations--suggesting the body was moved, Costopoulos wrote, 'casts further doubt on the 127 1/2-foot location, not to mention the prosecution's case in general.'

"Costopoulos wrote, 'Kim was only linked to the scene of the

body find, and by two pieces of evidence: tire casts made on the farm lane about 100 feet toward Sylvan Dell Road and boot casts made at the 127 1/2-feet location.'

"Continuing, he wrote, if the (first discoverer of the body and an associate) were correct in their location of 27 feet from the road, 'the cast evidence was fabricated because the defendant would not have gone beyond 30 feet on the farm lane and therefore his tires and boots could not have made those impressions in the cornfield.'

"COSTOPOULOS ALSO concluded that the left-front tire cast was made from a tire that was not even on Hubbard's car at the time the prosecution said the cast was made at the site where the body was found Oct. 28.

"'Keeping in mind that the tire casts were poured on Oct. 28 and were said to be the impressions made by Kim's car on Oct. 19, the date of the murder, the prosecution's official evidence then included a tire which was not even on the car until October 29--10 days after the murder. The only logical conclusion to be drawn is that (the tire cast in question) was fabricated,' Costopoulos wrote.

"He cited numerous other discrepancies in the tire evidence, including a right-rear tire cast that clearly shows an imprint of "ELD" from the sidewall of a Kelly-Springfield tire.

"'According to several state police experts,' Costopoulos write, 'the tire of a moving vehicle cannot leave an impression of the tire's trademark. Moreover, the tire must be off its rim in order to make even a stationary impression of the trademark.'

"He also questioned whether the mud in which the tire tracks were noted actually existed in the farm lane and wrote, 'There is evidence to suggest that some or all of the tire casts were possibly fabricated at the South Williamsport Borough Hall, where the car was impounded.'

"EXAMINING THE boot-print evidence, Costopoulos said, 'The only conclusion to be reached is that (the cast) is not a cast of heel prints taken at the 127 1/2-foot scene of the victim's body.'

"The boot casts, Costopoulos said, linked Hubbard to the scene of the body find 'and probably was the most damaging piece of evidence overall.'

"Yet, the attorney said, 'The serious discrepancies surrounding the boot-cast evidence, like those of the tire casts, do not prove the innocence of Kim. But, again, without it, the commonwealth's already highly-circumstantial case would have been non-existent.'

"He also found 'numerous discrepancies relative to the victim's clothing, together with the condition and location of the body, suggesting that the body itself was tampered with.'

"AT THE TRIAL there also was conflicting testimony on whether the clothes the victim was wearing at the time of the autopsy was the same she was wearing when she disappeared, yet her family said she did not arrive home the day she disappeared.

"Costopoulos also discussed the principal witness who, with her daughter's assistance in identifying Jennifer Hill, said she saw the victim entering what she said was Hubbard's car. This key witness had been hypnotized, Costopoulos notes, before testifying. Ertel later acknowledged this was done 'to assist her recollection.'

"Kim Hubbard and his parents would welcome a new trial, Joseph Hubbard said, even

though his son has been paroled, because they want to clear his name.

"Costopoulos said a new trial can be sought only after obtaining significant new evidence on where and by whom Jennifer Hill was killed.

"JOE HUBBARD is convinced he knows who placed the hands on Jennifer Hill's neck with such force that strangulation occurred.

"In his analysis, Costopoulos tells of three factors that indicate where the death took place and points a finger, but that information is being withheld by the Sunday Patriot-News, since no charges have been filed.

"Costopoulos recommended to the Hubbard family that their aim of clearing the name of their son 'is best served at present by extralegal means, namely, further investigation.

"'Their legal recourse has been virtually exhausted.' Costopoulos wrote, 'and it is our professional opinion that the Hubbards can currently expect no positive results from a criminal justice system which has served them so poorly in the past.'

"Joe Hubbard said last week

> he will continue that investigation 'until my dying day,' a quest for vindication that's become a passion in the family's life--with 'a lot of community support,' Costopoulos noted."

Although Defendant Costopoulos stated in his deposition (N.T. 45 and 46) that he did not give approval to publishing an article based upon "the Costopoulos Report", the Affidavit of Plaintiff refutes this denial (Affidavit of Plaintiff, Paragraph 3). The Affidavit of Defendant Costopoulos, after claiming that everything set forth in his report was pure opinion based on fact stated in Paragraph 10 as follows:

> "10. When my report was completed, I gave it to Joseph Hubbard and to no one else, and I had no knowledge or reason to believe that Joseph Hubbard intended to distribute the report to any other person or entity."

This contention is refuted by the Affidavit of Plaintiff in Paragraph 3.

This motion for summary judgment is premature at this point because Plaintiff intends to take the deposition of Defendant Sarge and the Patriot-News Company. This would have been unproductive prior to the production of the report of Costopoulos. It is true that the Defendants steadfastly refuse to produce this report until March 1988. Therefore, their assertion of ample time for discovery is not proper. In addition, many documents were produced by Mr. Hubbard, and these documents need to be reviewed prior to the depositions of Sarge and other personnel of the Patriot-News. Pa.R.C.P. 1035(e).

While it is premature, at this point, to decide the summary judgment motion inasmuch as discovery is not yet complete, the following facts as testified to in the Affidavit of Plaintiff are incorporated herein by reference.

QUESTIONS INVOLVED

I. IS THIS MOTION FOR SUMMARY JUDGMENT PREMATURE?

Suggested Answer: Affirmative

II. IS THERE EVIDENCE IN THIS MATTER FROM WHICH "ACTUAL MALICE" MAY BE INFERRED?

Suggested Answer: Affirmative.

RULE 1035. MOTION FOR SUMMARY JUDGMENT

(a) After the pleadings are closed, but within such time as not to delay trial, any party may move for summary judgment on the pleadings and any depositions, answers to interrogatories, admissions on file and supporting affidavits.

Note

See Definition Rule 76 for definition of "affidavit."

In asbestos litigation, a motion for summary judgment filed by one defendant alleging a ground common to one or more other defendants is deemed filed on behalf of all such defendants. See Rule 1041.1(f).

(b) The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issues of liability alone although there is a genuine issue as to the amount of damages.

(c) If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(d) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the signer is competent to testify to the matters stated therein. Verified or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(e) Should it appear from the af-

fidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(f) Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Adopted April 18, 1966, effective May 9, 1966. Amended effective April 18, 1975; Oct. 16, 1981. Amended April 4, 1990, and applied to actions commenced on or after July 1, 1990.

[See Explanatory Comment--1981 following Rule 76]

[See Explanatory Comment--1990 following Rule 1041.1]

(2)

Supreme Court, U.S.
FILED
OCT 28 1996
CLERK

No. 96-494

In The

Supreme Court of the United States

October Term, 1996

ALLEN E. ERTEL,

Petitioner,

v.

THE PATRIOT-NEWS COMPANY, DICK SARGE and WILLIAM C. COSTOPOULOS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION OF RESPONDENTS THE PATRIOT-NEWS COMPANY AND DICK SARGE

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16 pp

QUESTIONS PRESENTED FOR REVIEW

1. Where the judgment of the state court below rests on adequate and independent state law ground, may this Court properly exercise jurisdiction pursuant to 28 U.S.C. §1257?

2. Where Petitioner did not properly preserve, and the state court below did not decide, any federal question, may this Court properly exercise jurisdiction pursuant to 28 U.S.C. §1257?

3. Where the ruling of the state court presented for review does not give rise to an important question of federal law, should this Court grant review?

PARTIES TO THE PROCEEDING

Petitioner Allen E. Ertel was the plaintiff in the Court of Common Pleas of Philadelphia County and was the appellee in the Supreme Court of Pennsylvania, the court whose judgment is sought to be reviewed.

Respondents The Patriot-News Company, Dick Sarge and William C. Costopoulos were defendants in the Court of Common Pleas of Philadelphia County and were appellants in the Supreme Court of Pennsylvania.

The parent company of The Patriot-News Company is Advance Publications, Inc. The following are the subsidiaries (except wholly-owned subsidiaries) of the Patriot-News Company:

Interculture Communications, Inc.
Conde Nast China LLC
Barrie & Jenkins Ltd.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

OPINION BELOW 1

STATEMENT OF THE CASE 2

ARGUMENT 4

I. THE COURT LACKS JURISDICTION OVER THIS CASE 4

A. Because the Judgment of the State Court Rested on an Adequate and Independent State Law Ground, This Court Should Deny the Petition for Writ of Certiorari 4

B. Ertel Failed to Preserve, and the State Court did not Consider, Ertel's Federal Due Process Argument or his Argument Based on *Milkovich v. Lorain Journal Co.* 5

II. THE QUESTIONS PRESENTED DO NOT MERIT THIS COURT'S ATTENTION 7

A. The Pennsylvania Supreme Court's Ruling did not Address or Concern an Important Question of Federal Law 8

B. The Decision Presented for Review is not in Conflict with Federal Law 9

C. Ertel's Petition Improperly asks this Court to Review the Factual Findings of the Pennsylvania Supreme Court 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) ..2, 10

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 2, 10

Ertel v. The Patriot-News Co., 674 A.2d 1038 (Pa. 1996) 1

Godchaux Co. v. Estopinal, 251 U.S. 179 (1919) 6

Herb v. Pitcairn, 324 U.S. 117 (1945) 4

Herndon v. Georgia, 295 U.S. 441 (1935) 6

Immuno AG. v. Moore Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, *cert. denied*, 500 U.S. 954 (1991) 9

Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988) 10

McCorquodale v. Texas, 211 U.S. 432 (1908) 6, 7

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) ... 6, 7, 9

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 10

Texas v. Mead, 465 U.S. 1041 (1984) 10

United States v. Johnston, 268 U.S. 220 (1925) 10

UNITED STATES CONSTITUTION

U.S. Const. amend. I. 9

U.S. Const. amend. XIV 6

COURT RULES

U.S. Supr. Ct. R. 10 8

Pa. R.C.P. 1035 .....2, 5

BRIEF IN OPPOSITION

Respondents The Patriot-News Company and Dick Sarge respectfully pray that the Petition for Writ of Certiorari sought in this matter be denied.

OPINION BELOW

Petitioner Allen E. Ertel seeks review of the decision that the Supreme Court of Pennsylvania issued in this matter on April 17, 1996. That court's opinion is reported, *see Ertel v. The Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996), and is reprinted in Appendix C to the Petition for Writ of Certiorari.

The Pennsylvania Supreme Court's opinion addressed a single issue: what is the proper application of Pennsylvania Rule of Civil Procedure 1035 in a public figure's defamation action, where newspaper defendants have moved for summary judgment and where the plaintiff has failed to produce any evidence of falsity?

The Pennsylvania Supreme Court held that under Rule 1035 of the Pennsylvania Rules of Civil Procedure, a state court rule of procedure governing summary judgment motions in Pennsylvania state court actions, the moving party is not required to negate elements of the non-moving party's case until the non-moving party introduces evidence supporting the elements of its claims. The Pennsylvania Supreme Court held further that, to survive a summary judgment motion in a civil case pending in a Pennsylvania state court, the non-moving party is required to adduce sufficient evidence on

an issue essential to its case and on which it will bear the burden of proof at trial such that a jury could return a verdict in its favor. In reaching its decision, the Pennsylvania Supreme Court adopted the federal summary judgment standard enunciated by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), as the law of Pennsylvania applicable to motions brought pursuant to Pennsylvania Rule of Civil Procedure 1035.

In applying this standard, the Pennsylvania Supreme Court held that Ertel did not offer evidence that any of the allegedly defamatory material was false. As a result, the court held that there was no genuine issue of material fact regarding falsity and entered judgment in favor of respondents, including The Patriot-News Company and Dick Sarge.

STATEMENT OF THE CASE

Allen E. Ertel initiated this action in 1985 by filing a complaint in the Court of Common Pleas for Philadelphia County against the Patriot-News Company (the "Patriot-News") and its reporter, Dick Sarge, as well as attorney William C. Costopoulos. In his complaint, Ertel alleged that he was defamed by an article which was written by Sarge and published in the *Sunday Patriot-News* on June 30, 1985. The text of the article is reprinted in Appendix B of the petition.

The article reported the findings of an investigation undertaken by Costopoulos, a locally prominent criminal defense attorney, into a high profile murder case that

Ertel had successfully prosecuted while serving as District Attorney of Lycoming County, Pennsylvania. The article explained that Costopoulos had been hired to conduct his investigation by the family of Kim Hubbard, the convicted defendant, and that Costopoulos had concluded that the family's claim "of a strong pattern of prosecutorial manipulation and/or tampering of evidence has significant merit." *See* Appendix B of the petition at 92.

There was no dispute that The Patriot-News article fairly and accurately reported the contents of Costopoulos' report. There was also no dispute that, prior to the publication of the article, the Patriot-News and other area publications had published at least six other articles concerning the same contentions of the Hubbards that were the subject of Costopoulos' report. Nevertheless, Ertel argued that the publication of Costopoulos' findings defamed him.

After a period of discovery, the newspaper defendants and Costopoulos separately moved for summary judgment. On May 10, 1991, the Honorable Abraham J. Gafni of the Court of Common Pleas of Philadelphia County granted defendants' motions and entered judgment in favor of defendants and against plaintiff. The trial court's decision is reprinted in Appendix A of the petition. The trial court held that Ertel had "failed to set forth that he can present evidence sufficient as a matter of law to support a finding of actual malice." *See* Appendix A of the petition at 10.

Ertel then appealed to the Pennsylvania Superior Court. A divided panel of three Superior Court judges

ruled that Ertel had set forth enough evidence as a matter of law to support a finding of "actual malice" and entered an order in which the judgment of the Court of Common Pleas was reversed and remanded for further proceedings. The Superior Court's decision is reprinted in Appendix B of the petition.

The Patriot-News and Sarge sought discretionary review from the Pennsylvania Supreme Court, as did Costopoulos. After granting review, the Pennsylvania Supreme Court, in a unanimous decision, reversed the decision of the Superior Court and entered summary judgment in favor of the defendants.

Ertel filed an application for reargument with the Pennsylvania Supreme Court, which was denied without opinion.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS CASE

A. Because the Judgment of the State Court Rested on an Adequate and Independent State Law Ground, This Court Should Deny the Petition for Writ of Certiorari.

It is well settled that this Court will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). The Court's "only power over state judgments is to correct them to the extent they incorrectly adjudged federal rights and [the Court's] power is to correct wrong judgments, not to revise opinions." *Id.* at 125-126.

In this case, the Pennsylvania Supreme Court's decision unquestionably rests on an adequate and independent state law ground. The Pennsylvania Supreme Court held that respondents were entitled to summary judgment based solely on its interpretation of Rule 1035(d) of the Pennsylvania Rules of Civil Procedure.

Moreover, the state supreme court explicitly declined to address the federal arguments put forth by the Patriot-News and Sarge, stating: "Because we have determined that the Superior Court's holding was in violation of Pa.R.C.P. No. 1035, we need not determine whether it was also unconstitutional." *See* Appendix C of the petition at 16, n. 5.

Accordingly, this Court lacks jurisdiction pursuant to 28 U.S.C. §1257 to review the judgment of the Pennsylvania Supreme Court and should deny the petition.

B. Ertel Failed to Preserve, and the State Court did not Consider, Ertel's Federal Due Process Argument or his Argument Based on *Milkovich v. Lorain Journal Co.*

Ertel failed to preserve in the state courts of Pennsylvania the arguments grounded in federal law purportedly presented in his petition. This Court thus lacks jurisdiction pursuant to 28 U.S.C. §1257 to review the judgment of the Pennsylvania Supreme Court for this reason as well.

Ertel argues in his petition that the entry of summary judgment in favor of respondents and against him constituted a denial of his right to due process of law under the

Fourteenth Amendment to the United States Constitution and evaded the holding of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Ertel did not raise either of these arguments in state court until he filed his application for reargument in the Pennsylvania Supreme Court.

Having raised these arguments grounded in federal law for the first time in his application for reargument, Ertel clearly raised them too late to have been preserved for this Court's review. In *Herndon v. Georgia*, 295 U.S. 441, 443 (1935), this Court stated that "[t]he long established rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Similarly, in *Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919), this Court held:

> The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner; *and further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point.*

Id. at 181 (emphasis added).

And, in *McCorquodale v. Texas*, 211 U.S. 432 (1908), this Court emphasized:

> This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State after that court has pronounced its final decision. It is true that we have

> also decided that if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so. It can hardly be said to so appear in the case at bar. The order of the court is nothing more than the denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion.

Id. at 437 (citations omitted). Accordingly, this Court in *McCorquodale* dismissed the writ of error due to the failure of the plaintiff in error properly to preserve a federal question for this Court's review.

Here, Ertel is in the same position as the plaintiff in error in *McCorquodale*. It cannot be concluded from the Supreme Court of Pennsylvania's denial of Ertel's application for reargument that the court passed upon the merits of Ertel's federal law contentions raised for the first time in that application.

In light of the decisions cited above, this Court should deny Ertel's Petition. It is clear that Ertel has failed to preserve for this Court's review the questions presented in his petition for writ of certiorari.

II. THE QUESTIONS PRESENTED DO NOT MERIT THIS COURT'S ATTENTION

Even if Ertel had preserved his federal due process and *Milkovich* arguments by timely asserting these points, this case still would not be appropriate for review on writ of certiorari.

A. The Pennsylvania Supreme Court's Ruling did not Address or Concern an Important Question of Federal Law.

As set forth in this Court's Rule 10, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Such reasons may be found to exist where a state court's ruling creates or perpetuates a split of authority regarding a matter of federal law or where a case gives rise to a federal question of overriding importance.

The decision from which Ertel seeks review does not qualify under these criteria. The ruling of the Pennsylvania Supreme Court does not create or perpetuate any conflict of authority regarding a matter of federal law. Furthermore, while the Pennsylvania Supreme Court's ruling as to a matter of Pennsylvania law is of importance to Ertel, the ruling does not give rise to any federal question of overriding importance.

Ertel's petition seeks review of the Pennsylvania Supreme Court's ruling construing and applying Pennsylvania's Rule of Civil Procedure governing consideration of motions for summary judgment. In his petition, Ertel tries desperately to make a federal case out of a Pennsylvania state court's ruling on its own procedural rules. No amount of effort, however, can make this case worthy of review by this Court.

Therefore, this Court should deny Ertel's petition.

B. The Decision Presented for Review is not in Conflict with Federal Law.

Ertel's contention that the ruling of the Pennsylvania Supreme Court evades the federal law established in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1989), is without merit.

Milkovich in no way precludes a court from entering summary judgment in a public figure's defamation action against a newspaper where the court determines that the plaintiff has not proffered any evidence of falsity. Rather, in *Milkovich* this Court held that it was not persuaded that "an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." *Id.* at 21. The Court explained that "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Id.* Thus, although *Milkovich* held that a statement of opinion could imply a false assertion of fact, it does not follow that summary judgment is precluded as a matter of law in every situation in which a plaintiff avers that an article contains defamatory implications.[1]

Accordingly, the Pennsylvania Supreme Court's decision is not in conflict with *Milkovich*. Rather, the decision is entirely consistent with *Milkovich* and other federal

---

[1] Moreover, it is beyond question that states may give more protection to statements of opinion *under state law* than the minimum required by the federal constitution. *See, e.g., Immuno AG. v. Moòre Jankowski*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1278, *cert. denied*, 500 U.S. 954 (1991).

precedents. In holding that a non-moving party was required to adduce sufficient evidence on an issue on which it bears the burden of proof to survive summary judgment, the Pennsylvania Supreme Court explicitly adopted the rulings of this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 244 (1986).

Moreover, the Pennsylvania Supreme Court's ruling is consistent with and indeed flows from this Court's ruling in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), which established that a plaintiff has the burden of proving falsity in a case involving a media defendant. This burden is applicable at the summary judgment stage. *See, e.g., Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988).

C. Ertel's Petition Improperly Asks This Court to Review State Court Factual Findings.

It is clear that Ertel is, in actuality, asking this Court to re-examine the factual record of this case and revisit the Supreme Court of Pennsylvania's conclusion that Ertel failed to produce sufficient facts demonstrating that the article in question was false. This Court has repeatedly held that it does not grant certiorari when review is sought of a decision which turns solely upon an analysis of the particular facts involved. *See United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); *see also* United States Supreme Court Rule 10 ("[A] Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . . ").

This Court should not grant Ertel's petition merely to revisit the Pennsylvania Supreme Court's determination that Ertel failed to produce sufficient evidence of falsity.

CONCLUSION

For the foregoing reasons, this Court should deny Ertel's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 96-494 Supreme Court, U.S.
FILED
OCT 28 1996

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ALLEN E. ERTEL,

Petitioner

v.

PATRIOT-NEWS AND WILLIAM C. COSTOPOULOS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT WILLIAM C. COSTOPOULOS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the unanimous decision of the Supreme Court of Pennsylvania that petitioner's evidence did not create a triable issue of fact on the question whether respondent Costopoulos had "procured" publication of an allegedly defamatory newspaper article in *The Patriot-News* presents a substantial federal question?

2. Whether the unanimous decision of the Supreme Court of Pennsylvania holding that petitioner had failed to meet his burden of coming forward with evidence that the publication challenged as defamatory was false under the federal constitutional rule of *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), and under Pennsylvania's summary judgment procedure, is contrary in any way to *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	4
1. The Pennsylvania Supreme Court's Adjudication That There Was Insufficient Evidence to Establish That Attorney Costopoulos Procured the Allegedly Defamatory Publication Does Not Present a Substantial Federal Question	4
2. Petitioner's Claim That *Milkovich v. Lorain Journal Co.* Was Improperly Overlooked in the Course of the Pennsylvania Supreme Court's Application of the Federal Constitutional Rule Announced in *Philadelphia Newspapers v. Hepps* Is Groundless	6
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page(s)

Barto v. Felix, 250 Pa. Super. 262, 378 A.2d 927 (1977) .. 3

Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977) 2

Commonwealth v. Hubbard, 485 Pa. 353, 402 A.2d 999 (1979) 2

Ertel v. The Patriot-News Co., 674 A.2d 1038, 1996 Pa. LEXIS 721 ..... i, 1, 3, 4, 5, 8, 9

Gaetano v. Sharon Herald Co., 426 Pa. 179, 231 A.2d 753 (1967) 4

Henry v. Pittsburgh & L.E.R. Co., 139 Pa. 289, 21 A. 157 (1891) 4, 5

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) ..... i, 6, 8, 9, 10

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 3

Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) ..... i, 6, 7, 8, 9, 10

Sprague v. Casey, 520 Pa. 38, 550 A.2d 184 (1988) 2

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 6

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977) 6

Statutes:

28 U.S.C. §1257(a) 1

42 Pa. C.S.A. §8343(a)(2) 4

Miscellaneous:

Restatement (Second) of Torts §577, comment f. 4

Pa.R.C.P. No. 1035 ..... 5, 8

Rule 56, F.R. Civ. P. 5

BRIEF OF RESPONDENT WILLIAM C. COSTOPOULOS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent William C. Costopoulos respectfully requests that the Court deny petitioner's request for a Writ of Certiorari to the Supreme Court of Pennsylvania.

OPINION BELOW

The unanimous opinion of the Supreme Court of Pennsylvania is reported under the caption *Ertel v. The Patriot-News Co.*, 674 A.2d 1038, 1996 Pa. LEXIS 721. The unreported opinions of the Superior Court of Pennsylvania and the Common Pleas Court of Philadelphia County are included in the Appendix to the Petition at 16a and 1a, respectively.

JURISDICTION

Petitioner makes no reference to the jurisdiction of this Court. Certiorari jurisdiction to review final judgments entered by the highest courts of states lies under 28 U.S.C. §1257(a), where, *inter alia*, rights under the United States Constitution are claimed. Although petitioner claims that the decision of the Supreme Court of Pennsylvania violates the Fourteenth Amendment, the federal constitutional claims are insubstantial and this Court accordingly lacks jurisdiction.

In addition, the Supreme Court of Pennsylvania's ruling that petitioner's evidence was insufficient as a matter of law to sustain his claim that respondent Costopoulos had "procured" the allegedly defamatory publication under Pennsylvania's common law, 674 A.2d at 1043, constitutes an independent and adequate state ground for the judgment in Costopoulos' favor. As such, this Court lacks jurisdiction to review other issues raised by petitioner, assuming arguendo that those issues raise substantial federal questions.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner invokes Section 1 of the Fourteenth Amendment to the United States Constitution. The text is set forth in the Petition, at 2.

STATEMENT OF THE CASE

The one and only claim pleaded in this action is defamation, based on the statutory and common law of the Commonwealth of Pennsylvania. The gist of the defamation claim is that an article published in the June 30, 1985 edition of the *Harrisburg Sunday Patriot-News* libelled petitioner for his role as the elected District Attorney of Lycoming County, Pennsylvania[1] in the conduct of a highly publicized murder investigation and trial in 1974.[2] The article quoted the view, expressed

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1. Petitioner Ertel is a prominent figure in Pennsylvania politics. After his term as District Attorney of Lycoming County, Ertel served as a United States Congressman. He also ran unsuccessfully for Governor and for Attorney General. In 1988 Ertel won a primary election for a seat on the Pennsylvania Supreme Court. In the interim between the primary and the general elections, the Pennsylvania Supreme Court directed the Secretary of the Commonwealth to remove Ertel's name from the ballot because the election was scheduled for an even-numbered, general election year in violation of the Pennsylvania Constitution. *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988).

2. Twenty year old Kim Lee Hubbard was convicted in 1974 of murdering 12 year old Jennifer Hill. The prosecution's theory of the case was that Hubbard abducted his younger sister's friend, strangled her, and disposed of her body in a cornfield, all on October 19, 1973.

The prosecution's case was based primarily on circumstantial physical evidence that was the source of considerable dispute at trial, on appeal, and in post-conviction proceedings. Among the disputed physical evidence issues was the condition of the victim's body (found in a relatively fresh condition after having been exposed to the elements for nine days according to the prosecution's theory) and tire casts (of a tire that was installed on Hubbard's car the day after the body was discovered and showing an imprint of letters on the sidewall which is improbable if taken from tracks left in the mud by a moving tire). There were additional questions raised concerning boot casts allegedly taken from the cornfield, the victim's clothing and the location of the body in the cornfield.

Hubbard was convicted of second degree murder and sentenced to 10 to 20 years in prison. The conviction was affirmed ultimately on appeal, and post-conviction proceedings in federal court were unsuccessful. Reported decisions include: *Commonwealth v. Hubbard*, 472 Pa. 259, 285, 372 A.2d 687, 699 (1977) (rejecting all but one of the claims of trial error; finding that Ertel personally had engaged in "prejudicial prosecutorial misconduct during his summation" and remanding for an evidentiary hearing concerning trial counsel's failure to object); *Commonwealth v. Hubbard*, 485 Pa. 353, 357, 402 A.2d 999, 1001 (1979) (affirming conviction and holding that "trial

by respondent William C. Costopoulos in a confidential legal opinion letter delivered to his clients, that there was "significant merit" to the Hubbard family's belief that there was "a strong pattern of prosecutorial manipulation and/or tampering of evidence." *Ertel v. The Patriot-News Co.*, 674 A.2d 1038, 1040, 1996 Pa. LEXIS 721. The Costopoulos Report is attached to this Brief as a Supplemental Appendix.

The Common Pleas Court of Philadelphia County granted summary judgment in favor of all defendants on the ground that plaintiff, a public figure, could not meet the actual malice standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* Petition, at 6a. In an unpublished, two-to-one decision, the Superior Court of Pennsylvania reversed and remanded for trial. Petition, at 1b. The Supreme Court of Pennsylvania reversed and reinstated summary judgment for all defendants on the grounds that:

> (1) petitioner had failed to "offer evidence that any of the material at issue in the June 30th [*Patriot-News*] article was false", 674 A.2d at 1042, 1996 Pa. LEXIS at 12; and
>
> (2) the evidence was "insufficient as a matter of law to show that [respondent William C.] Costopoulos procured the publication of the June 30th article." 674 A.2d at 1043, 1996 Pa. LEXIS at 14.

The Petition for Writ of Certiorari presents no substantial federal questions, much less a federal question that warrants the exercise of this Court's discretionary certiorari jurisdiction.

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counsel's failure to object . . . was born of a reasonable, calculated, and apparently successful trial strategy"). *See also Barto v. Felix*, 250 Pa. Super. 262, 378 A.2d 927 (1977) (holding that public defender representing Hubbard on direct appeal of criminal conviction was not entitled to immunity from defamation liability for statements made to press on courthouse steps concerning misconduct by investigating state police officers in connection with the same circumstantial physical evidence).

ARGUMENT

1. The Pennsylvania Supreme Court's Adjudication That There Was Insufficient Evidence to Establish That Attorney Costopoulos Procured the Allegedly Defamatory Publication Does Not Present a Substantial Federal Question.

Like most states, Pennsylvania law requires a defamation plaintiff to prove that a defendant actually published the defamatory manner. 42 Pa. C.S.A. §8343(a)(2); *Gaetano v. Sharon Herald Co.,* 426 Pa. 179, 182, 231 A.2d 753, 755 (1967). Pennsylvania law recognizes a narrow exception to the publication requirement for those who "procure" the publication of defamatory material by others. *Ertel v. The Patriot-News Co.,* 674 A.2d at 1043, 1996 Pa. LEXIS at 15; *Henry v. Pittsburgh & L.E.R. Co.,* 139 Pa. 289, 298, 21 A. 157 (1891). *See also Restatement (Second) of Torts* §577, comment f. Liability for procuring a libellous publication requires proof that the defendant "directed or participated in the publication of the defamatory publication by another." 674 A.2d at 1043, 1996 Pa. LEXIS at 14. According to the Pennsylvania Supreme Court in *Ertel,* petitioner was required to show "at the very least, evidence of some affirmative action on the part of [Costopoulos]." 674 A.2d at 1043, 1996 Pa. LEXIS at 14.

The undisputed facts showed that Costopoulos delivered his confidential opinion letter to his client and to no one else. It was the client who transmitted the Costopoulos opinion letter to the newspaper. 674 A.2d at 1040, 1996 Pa. LEXIS at 2. Accordingly, there was no basis for claiming that attorney Costopoulos himself had published the allegedly libellous statements and petitioner did not contend otherwise.[3]

On the procuring issue, the only evidence of Costopoulos' involvement in the publication was a telephone call from respondent Dick Sarge, the newspaper reporter, to Costopou-

3. The Petitioner erroneously states at page 12 of the Petition that "[t]he *article* in the case at bar was prepared for Joseph Hubbard for a fee of $2,500.00." (Emphasis added). Costopoulos did not prepare the *Patriot-News* article, respondent Dick Sarge did. 674 A.2d at 1040, 1996 Pa. LEXIS at 2. Costopoulos prepared the Report for his client, which Sarge then quoted in his newspaper article.

los. Sarge, who already had the Costopoulos opinion letter in hand, inquired of Costopoulos whether the newspaper could publish the report. Costopoulos replied: "I don't care what you do with it." 674 A.2d at 1043, 1996 Pa. LEXIS at 14. On those facts, the Pennsylvania Supreme Court directed that summary judgment be entered for attorney Costopoulos, holding that petitioner had adduced insufficient evidence to make out a triable claim on the procuring issue:

> "Costopoulos is entitled to judgment as a matter of law. Taking Sarge's statement in the light most favorable to Ertel as the non-moving party, this evidence at best shows that Costopoulos did not act to prevent Sarge from writing his article, and the *Patriot-News* from publishing it. This evidence is insufficient as a matter of law to show that Costopoulos procured the publication of the June 30th article. Costopoulos did not affirmatively act to direct or participate in the publication of the June 30th article; rather, he merely failed to hinder its publication. Thus, the entry of summary judgment in favor of Costopoulos by the trial court was correct . . . ." 674 A.2d at 1043-44, 1996 Pa. LEXIS at 16.

In essence, the Pennsylvania Supreme Court restated and refined Pennsylvania's common law rule on the liability of persons for procuring the publication of defamatory matters by others. This is an arcane area of Pennsylvania law that the state Supreme Court last addressed in 1891. See *Henry v. Pittsburgh & L.E.R. Co.*, 139 Pa. 289, 21 A. 157 (1891).

The requirement that petitioner prove that respondent Costopoulos "actively participated" in the publication does not implicate the federal constitution. Neither the Fourteenth Amendment nor any other provision of the United States Constitution requires states to facilitate defamation recoveries by public officials on proof of a lesser degree of involvement in the publication than "active participation."[4]

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4. Nor is there any basis for claiming that petitioner's procedural due process rights were infringed. In granting summary judgment for Costopoulos on the procuring issue, the Pennsylvania Supreme Court applied Rule 1035(b), Pa.R.C.P., which is similar in all material respects to Rule 56, F.R.Civ.P. After five years of discovery, the defendants moved for summary

2. Petitioner's Claim That *Milkovich v. Lorain Journal Co.* Was Improperly Overlooked in the Course of the Pennsylvania Supreme Court's Application of the Federal Constitutional Rule Announced in *Philadelphia Newspapers v. Hepps* Is Groundless[5]

In deciding that petitioner's failure to adduce *any* record evidence that *The Patriot-News* article contained false statements was fatal to his case, the Pennsylvania Supreme Court invoked, and faithfully applied, the federal constitutional rule of *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). The *Hepps* rule requires that states impose on public figure plaintiffs the burden of proving falsity in defamation cases. 475 U.S. at 767. The Court below properly applied the *Hepps* burden of proof standard in the context of a summary judgment motion that tested the adequacy of petitioner's falsity evidence. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), is not to the contrary.

Even though Ertel could point to no record evidence that established that any statement made about him in the *Patriot-News* article was false, the Superior Court of Pennsylvania (an

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NOTES *(Continued)*

judgment based upon the record evidence, including admissions in pleadings, deposition testimony and answers to interrogatories. Plaintiff was given the opportunity to respond, and in fact did respond, and filed a personal affidavit in his ultimately unsuccessful effort to refute various facts relied on by the respondents in their motions for summary judgment. The defendants' motions for summary judgment were handled in the regular course of motion practice in the Common Pleas Court of Philadelphia. Similarly, the appeals to the Superior and Supreme Courts were handled routinely and in accordance with the Pennsylvania Rules of Appellate Procedure. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (states must provide notice and an opportunity to be heard before depriving citizen of property). Petitioner accordingly received all the process that was due him.

5. The Supreme Court of Pennsylvania's ruling on the procuring issue is dispositive of the entire case against respondent Costopoulos. Accordingly, there exists an independent and adequate state ground for the judgment in Costopoulos' favor, and the Court has no jurisdiction to consider any remaining issues involving him. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

intermediate state appellate court) held that the falsity issue was a triable claim because "Ertel's complaint satisfies his burden at this stage of the proceedings", Petition, at 60b, and because the defendants "[had] not come forward with any evidence that the allegations of evidence tampering are true." Petition, at 64b.[6]

The Supreme Court of Pennsylvania held that, because petitioner bears the burden of proving falsity under *Hepps*, he could not avoid summary judgment by resting on the empty, conclusory allegations of falsity pleaded in his complaint:

> "[I]t is the burden of a public figure plaintiff, such as Ertel, to show that the statements at issue are false. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775 (1986). The Court [in *Hepps*] reasoned that although 'requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so,' this result was justifiable since placing the burden on media defendants to prove truth would create fear of liability and deter free speech. *Id.* at 777-778.
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> . . . .
>
> The Superior Court held that the newspaper, as the moving party, was obliged to submit evidence that the claimed defamatory material was true, even though the newspaper had no such obligation at trial. *See* Super. Ct. Slip. Op. at 34. [Petition, at 34b] The Superior Court held that in the absence of the newspaper introducing any such evidence, Ertel had no obligation to introduce any evidence concerning its falsity. Employing this standard, the Superior Court concluded that since the newspaper failed to produce evidence to show that the material at issue

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6. The Superior Court also declined to attach any significance to Ertel's admission in answers to interrogatories that he could identify no false statements in the article. Asked by Costopoulos to identify each statement by him "which you contend is defamatory", petitioner responded: "I do not attribute any one statement, but the entire article, its tone, and conclusions are attributable to defendant Costopoulos as well as other defendants." Petition, at 22b. Describing the interrogatory answer as "evasive", the Superior Court nevertheless refused to construe it as an admission that petitioner had no evidence that any statement in the article was false. Petition, at 68b, 70b.

was true, then Ertel had no obligation to offer even a scintilla of evidence of falsity to withstand the motion for summary judgment.

The Superior Court's decision is inconsistent with the language and purpose of our summary judgment rule. Rule 1035 does not require that the moving party introduce evidence on an issue on which it does not bear the burden of proof in order to have its motion granted. Additionally, the rule explicitly states that a non-moving party may not avoid summary judgment by 'resting upon the mere allegations or denials of his pleading . . . .' *See* Pa.R.C.P. No. 1035(d). Allowing non-moving parties to avoid summary judgment where they have no evidence to support an issue in which they bear the burden of proof runs contrary to the spirit of Rule 1035. . . . Forcing parties to go to trial on a meritless claim under the guise of effectuating the summary judgment rule is a perversion of that rule." 674 A.2d at 1042, 1996 Pa. LEXIS, at 10. (footnote omitted).

The essence of the decision of the court below is that, both as a matter of federal constitutional law and of Pennsylvania summary judgment procedure, once the sufficiency of the evidence supporting a claim of falsity is properly challenged on a summary judgment motion, a public figure plaintiff has the burden of coming forward with some cognizable record evidence that tends to show that the challenged statements are false. Petitioner failed to do so, and under *Hepps* and Pennsylvania's summary judgment and procedure, the Pennsylvania Supreme Court properly felt obliged to summary judgment enter against him on the falsity issue.

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), supports this conclusion. In explaining why the First Amendment policy of encouraging free and robust debate about public officials and matters of public concern does not require a per se federal constitutional rule immunizing opinions from liability,[7]

7. The core decision in *Milkovich* is that there exists no "additional separate constitutional privilege for 'opinion'". 497 U.S. at 21.

the *Milkovich* Court emphasized the protection already afforded free speech by the *Hepps* burden of proof requirement:

> "*Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. . . .
>
> *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a *provably false factual connotation* will receive full constitutional protection." 497 U.S. at 19 (emphasis added, footnotes omitted).

Petitioner apparently takes encouragement from the *Milkovich* Court's reference elsewhere to the role that state defamation law plays in protecting public figures' reputations from "false and defamatory facts", "false implications" and "false connotations". 497 U.S. at 20. *See* Petition, at 11-12. Thus, the argument seems to go, this Court should grant review because the Pennsylvania Supreme Court's ruling that petitioner failed to meet his burden of proof on the falsity issue disregarded the false implications and connotations allegedly contained in the *Patriot-News* article, contrary to *Milkovich*.

That the *Milkovich* Court discerned a legitimate state interest in creating a defamation tort remedy to protect reputations from false statements and "implications" does not mean that the Court was formulating a rule of constitutional magnitude that *requires* states to provide a liberal defamation remedy for such publications. This Court's reference to tort recovery for false statements and "implications" was made in the context of pointing out the countervailing state interest in protecting reputation that the Court balanced against the federal constitutional interest in protecting free speech. As the *Milkovich* Court itself emphasized, *Hepps* strikes the constitutional balance in favor of free speech by imposing on public

figure plaintiffs the burden of proving falsity. The Court below properly applied the *Hepps* rule, and nothing in *Milkovich* trumps *Hepps*.[8]

CONCLUSION

The state court adjudication *against* a public figure plaintiff in this defamation case does not raise any questions that require the attention of the Supreme Court of the United States. The Supreme Court of Pennsylvania held that petitioner was not entitled to a trial of the procuring issue because the undisputed facts showed that respondent Costopoulos had not procured the allegedly defamatory publication as a matter of state law. The court below ruled against petitioner on the falsity issue because he failed to identify, and was unable to identify, any false statements in *The Patriot-News* article. These are failures of proof in a state tort case that involve no substantial federal questions.

For these reasons, respondent William C. Costopoulos respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

WHITE AND WILLIAMS
Attorneys for Respondent,
William C. Costopoulos

By: _____
David E. Sandel, Jr.
Michael N. Onufrak

Dated: October 28, 1996

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8. Petitioner's suggestion that this Court reach out and rule on questions not encompassed by the Pennsylvania Supreme Court's opinion is absurd. *See* Petition, at i & 12-14.

Supplemental Appendix

TO: MR. and MRS. JOSEPH HUBBARD

FROM: William C. Costopoulos, Esquire

DATE: June 5, 1985

RE: INDEPENDENT CASE ANALYSIS OF COMMONWEALTH OF PENNSYLVANIA vs. KIM LEE HUBBARD; Criminal No. 73-11, 218; Lycoming County, Pennsylvania

I. INTRODUCTION

This report is an independent case analysis conducted by the law firm of KOLLAS, COSTOPOULOS & FOSTER, 831 Market Street, P.O. Box 222, Lemoyne, Pennsylvania 17043. The subject of this report is Criminal No. 73-11, 218, Lycoming County, *Commonwealth of Pennsylvania vs. Kim Lee Hubbard.* The purpose of this report is to analyze all aspects of the evidence in the above case and, specifically, to answer the question: whether, by virtue of the evidence presented, that same evidence is sufficient to prove Kim Lee Hubbard innocent of the murder of Jennifer Hill. Further, we recommend any additional course of action necessary to effectuate the most beneficial disposition of the case. This report is based on evidence received by this office from Joseph Hubbard as well as readings of the main trial transcripts, appellate briefs and court opinions, interviews with all three appellate counsels and others, and a field trip to South Williamsport.

After careful review, we submit the following:

II. PROCEDURAL HISTORY

Kim Lee Hubbard was convicted of murder in the second degree of Jennifer Hill on March 1, 1974, following a trial by jury with Judge Charles F. Greevy of Lycoming County Court of Common Pleas, presiding. Patrick H. Fierro, Esquire of Williamsport, now deceased, was privately retained defense counsel. Kim was sentenced to serve 10 to 20 years at the State Correctional Institution in Dallas. Upon conviction, John (Jack) A. Felix, Esquire of Williamsport, became post-verdict counsel. The defendant's post-trial motions were denied. Peter T. Campana, Esquire of Williamsport, became appellate counsel for the defendant. On direct appeal to the Supreme Court of Pennsylvania, No. 386, January Term 1975, 372 A.2d 687, 472 Pa. 259, the Judgement of Sentence was vacated and the case remanded to trial court for proceedings consistent with opinion. Judge Greevy, following an evidentiary hearing over ineffectiveness of counsel, reinstated the Judgement of Sentence on August 18, 1977 (14 Lycoming 49). The defendant filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Pennsylvania, Civil Action No. 79-1056. The Writ was denied on November 26, 1979 by Nealon, J. On appeal to the United States Court of Appeals for the Third Circuit on December 11, 1979, No. 80-1369, the judgement of the District Court was affirmed on July 7, 1981. Finally, by Richard S. Watt, Esquire of Norristown, a petition under the Post-Conviction Hearing Act was filed in Lycoming County Court on January 7, 1982. Upon motion by the Lycoming County District Attorney, the petition was dismissed, without hearing, by Judge Robert J. Wollett. Kim Lee Hubbard, after a ten-year period of incarceration, is presently on parole.

III. FACTS OF THE CASE

Jennifer Hill, 12 years old, of 353 Hastings Street; South Williamsport, Pennsylvania, spent the night of October 18-19, 1973 with her friend, Ruth Hubbard, sister of Kim, at the Hubbard home, 1030 West Central Avenue, South Williamsport, Pennsylvania. The morning of Friday, October 19, a school vacation day, the two girls went outside to play. Jennifer was wearing a long-sleeve jersey, dark blue with gold trim and the number 33 in white letters, dark jeans with red hearts on the knees and red cuffs, and old black sneakers. At about 12 noon, Jennifer had a hoagie, milk shake and french fries. Later, during a grape battle, she ate several green grapes. Both girls returned to the Hubbard home between 3 and 3:30 p.m. At 3:40 p.m., Mrs. Norma Hill, mother of Jennifer, called the Hubbard home, spoke to her daughter and told her to come home. Jennifer began to cry. She wanted to go to a football game that night with the Hubbard's, but her parents refused to let her go, and she did not want to clean out her dresser drawers. At 3:45 p.m. Jennifer left the Hubbard home, alone and on foot, for the 10½ block walk to her own home. At 3:55 p.m. Joe Mendez testified he saw her one block from her home.

According to the prosecution, Mrs. Betty Nevel saw Jennifer in front of the Nevel home at 4:30 p.m. entering a light green car with a white helmet on the ledge. The car was driven by a man. Mrs. Nevel, a hypnotized eyewitness, did not actually identify Jennifer; her daughter, Beth, did.

According to the defense, Kim Hubbard left the Barr home at 3:58 p.m., alone in his car, and arrived at his home around 4 p.m. He walked to the Hum-Dinger restaurant and talked to Bob Fries for 15-20 minutes. Kim returned home and took a call from his girlfriend, Colleen Whitenight, at 4:30 to 4:35 p.m. Ruth Hubbard said that she and Kim argued over the use of the phone at 4:30 p.m. and then Colleen called. After the call, Kim continued buffing the floor in his sneakers. At 4:45 p.m. Jack Hill, father of Jennifer, called Kim and wanted to know where his daughter was. Kim asked his mother, Mrs. Dorisann Hubbard, who said she left at 3:45 p.m. Kim resumed buffing until 5 p.m., when his mother asked him to look for Jennifer.

The accusation against Kim, as presented by the trial judge to the jury, was that he picked up Jennifer with his own car in front of the Nevel home at 4:30 p.m., strangled her by hand, drove to the cornfield off Sylvan Dell Road in Armstrong Township, dumped her body 127½ feet off the road in that cornfield, drove back to his home and received a phone call from Jack Hill at 4:45 to 4:50 p.m. The crime and the accompanying sequence of events took place within 15-20 minutes according to the judge's charge to the jury.

Kim was convicted by three factors. First, the testimony of hypnotized eyewitness Mrs. Betty Nevel linked him to Jennifer's disappearance. Second, tire casts poured on the farm lane about 30 feet from Sylvan Dell Road tied him to the scene of body discovery; Cast No. 91 matched the left rear tire of Kim's car (marked as No. 87). And three, Boot Cast No. 51, made from under the victim's body, matched the defendant's left boot (marked as No. 97).

Kim's alibi was two-fold. First, Colleen Whitenight testified she called Kim at home from her father's store at 4:30 p.m. As she testified, Kenneth Whitenight, her father, shouted "Colleen, how can you sit up there and lie? For God's sake, you have lied enough already." He was ejected from the courtroom. A newspaper account added: "God forgive her, she doesn't know what she's doing!" Second, Mike/Phil Grimes, Kim's cousin and neighbor, testified that he saw Kim's car parked outside the Hubbard home the entire time between 4 and 5 p.m.

At about 3:55 p.m. on October 28, five minutes before the search was to be called off, Civil Air Patrol (CAP) Officer Duane Gleckner found the body of Jennifer, lying between rows of corn, which were parallel to Sylvan Dell Road, and three to four feet off the farm lane. Dr. Robert Catherman of Philadelphia, forensic pathologist, concluded that death occurred on October 19 between 4:30 to 6 or 8 p.m. by manual strangulation.

IV. SUBSTANTIVE EVALUATION OF THE CASE

This review will focus on five areas of disputed evidence: the condition of Jennifer Hill's body, the location of the body when found, tire casts, boot casts and clothing. In addition, we will briefly examine other issues in the case.

A. CONDITION OF THE BODY

Jennifer Hill was killed on October 19, 1973 and her body was found 9 days later in a cornfield on October 28. On October 31, at Noll Funeral Home in South Williamsport, a private, open-casket viewing of Jennifer's body was held. Dorisann Hubbard, mother of Kim, attended. This was 12 days after her death. The average ambient temperature during this period of October 19-28 was 49.95 degrees Fahrenheit by official National Weather Service records. Pathologist Catherman, in his autopsy report, concluded: "Based on the autopsy findings and a review of the circumstances surrounding the decedent's disappearance and the circumstances of the location and discovery of the decedent's body, *there is nothing inconsistent with the decedent's death occurring on or about 10/19/73.*" (emphasis added) We contend otherwise.

On January 23, 1980 at the Allegheny Co. (Pa.) Morgue, Forensic Pathologist Glen M. Larkin and Chief Autopsy Technician Floyd C. Coles examined pathological evidence related to Jennifer. They concluded, with absolute certainty, that her body was not in the cornfield for 9 days and had not even been dead for 9 days unless it had been refrigerated. There was very little decomposition; the stomach wall was not disintended; the stomach contents were identifiable with a great deal of detail; there was an almost complete lack of fly larvae and the brain was in good condition. Coles even states that "the condition of the body" is "completely inconsistent with a body being dead over 24 to 48 hours at the most." Steve McCune, a Noll employee who embalmed the body, reported that it was an "easy embalming," the blood was fresh, and "no way that body was dead that long." Mr. Noll, the funeral director, told Attorney Jack Felix that he was struck by the firmness of the body.

McCune further identified a dental tie (an embalming device) in the victim's mouth in body photo no. 8, which shows the body as found in the cornfield. And in one of the autopsy photos taken on October 29, ten days after death, rigor mortis of the right arm is depicted according to McCune. Rigor mortis occurs no longer than three days after death, not 10. Finally, Coroner Miller testified that the body was found lying on a cornstalk, though he contradicted himself by saying first the left shoulder was off the ground and later saying the right shoulder was uplifted. The autopsy report and photos show no marks on the back of the body, an almost certain result of a body lying on a cornstalk for 9 days.

The stomach contents were central in determining October 19 was the date of death. Dr. Catherman reported finding bread; french fries, a tomato, and a green grape with the skin partly peeled in the decedent's stomach, which is what she ate on October 19. According to Dorisann Hubbard, South Williamsport Mayor Frey cane to the Hubbard home on October 22 and asked what Jennifer had to eat on October 19. Police Chief Smith asked the same question on October 23 and also asked if she had a bowel movement that day. When Catherman was cross-examined on the date of death, he testified, "No, I was basing it (time/date of death) on the nature and type of stomach content that I observed in connection with the circumstances of the meal which she was last known to have eaten as you provided in the assumption of facts that I was given." As stated above, stomach contents would not be identifiable in a body lying in a field for 9 days let alone identifiable with such striking clarity.

Joe Hubbard and Charles King, a family friend, met with Dr. Catherman at the office of Philadelphia Medical Examiner after the trial. According to King, Catherman told them he received a phone call from District Attorney Ertel and Coroner Miller, who explained they had a body supposedly dead for 9 days but which looked "fresh." (Catherman, a boyhood friend of Miller and a native of Williamsport, is often called by Lycoming County to offer opinions favorable to the prosecution, according to Attorney Peter Campana.) When Joe Hubbard told Catherman they knew the body was refrigerated at

Williamsport Hospital after it was found on October 28, Catherman replied, "She was refrigerated long prior to the 28th of October. Why, where, when or by whom" he did not know.

Finally, it is important to note that Patrick Fierro, defense trial counsel, did not once raise the question of the condition of the victim's body at trial — a critical omission.

The fact that the condition of the body of Jennifer was found on October 28 and as publicly viewed on October 31 is wholly inconsistent with its being dead from October 19 and lying in a cornfield for nine days does not prove Kim Lee Hubbard's innocence. However, it conclusively demonstrates a fatal weakness in the prosecution's case: that Kim dumped the body in the cornfield on October 19 and that it was found by Duane Gleckner on October 28. For if the body was not in the field for nine days, then it was refrigerated. And if it was refrigerated, another person or persons is immediately implicated in the crime itself, and another person or persons dumped the body in the cornfield shortly before October 28 for it to be "discovered." In any case the body lay in the cornfield for only a short time prior to being found on October 28. The events of the murder of Jennifer Hill did not take place the way the prosecution asserted they took place because it is a medical and scientific impossibility for an unrefrigerated, 9-day old body lying in a cornfield in 50-degree, dry weather to appear "fresh" upon discovery.

B. LOCATION OF THE BODY

CAP Captain Duane Gleckner found the body of Jennifer Hill shortly before 4 p.m. on October 28 in a cornfield off Sylvan Dell Road in Armstrong Township. It was about 27 feet from Sylvan Dell Road (hereafter: road), lying inbetween rows of corn which are parallel to the road and perpendicular to the farm lane hereafter: lane), and 2 to 3 feet off the lane. He radioed Major Hunsinger, CAP officer in charge of the search, who confirmed the find. When Coroner Miller arrived at the scene; he made measurements while standing in the cornfield to the east of the body. Miller spoke aloud to

Trooper Housser who was standing on the road writing down the measurements. Miller's testimony confirms Gleckner's account of the body located about 30 feet from the road and lying in between corn rows parallel to the road. Miller referred to "original" photos Nos. 1 and 2 in his testimony, which depict the body lying in between corn rows with the feet closest to the lane.

Also at the trial, Trooper Barto testified he measured the body location at 127½ feet from the road and about 15 feet off the lane. District Attorney Ertel introduced aerial photos Nos. 36 and 37 of the cornfield, which show an indentation where the police cut down cornstalks around the body — it corresponds to the 127 feet location. Several people, including Gleckner, identified that area as where the body was found. However, only the first 8 rows run parallel to the road. All the others — including those at the 127½ feet location — run parallel to the farm lane and perpendicular to the road. And body photo Nos. 3 through 8 clearly show the body lying *across* rows of corn, contrary to the testimony of Gleckner and Miller; who were shown only photos Nos. 1 and 2 at trial. Two contradictory body locations were introduced at the trial by the prosecution: at 27-30 feet and at 127½ feet.

Three additional factors support this contradiction. First, Gleckner told Peggy Rachel in an affidavit filed by the latter in October 1980 that he is positive that there were two sets of body scene photos and that Ertel intentionally confused him with aerial photos Nos. 36 and 37. Second, Miller could not have orally relayed measurements to Houser, standing on the road, from the 127½ feet location — it simply is too far to be heard through standing corn rows. And finally — perhaps most interestingly of all — Max Young, the farmer of the cornfield, stated in a March, 1985 affidavit, that the corn was not standing after October 29.

Young arrived at the cornfield the morning of October 29, where police were still on the scene from the previous afternoon. He was given permission to harvest his corn except for a 30-foot square around the 127½ feet body location, and he did so commencing about 12 noon. Ertel introduced aerial photos Nos. 36 and 37, taken at an unspecified date after

October 28, to show the indentation created by the troopers when they cut down the cornstalks around the body and to have witnesses identify that location as the site where the body was found. Those photos were not taken October 28 or 29 because they show no police vehicles. They were not taken after 12 noon on October 29 because they show standing rows of corn. Aerial photos Nos. 36 and 37 had to be taken prior to October 28. Yet, they clearly show an indentation in the cornfield, which Ertel contended corresponded to the body location. In fact, that indentation has nothing whatsoever to do with troopers cutting down cornstalks because it existed before the body was found and the aerial photos themselves were taken before the body discovery on October 28. This casts further doubt on the 127½ feet location, not to mention the prosecution's case in general.

The existence of two body locations at trial does not prove the innocence of Kim Lee Hubbard. However, according to Attorney Dick Watt, appellate counsel, it is the most damaging piece of evidence against the prosecution scenario. Kim was never linked to the scene of the crime itself. At sidebar, Ertel admitted that "nobody knows where the scene of the crime is." Yet Judge Greevy, in his charge to the jury, said, "Obviously, the Defendant cannot be guilty unless he was at the scene of the crime. . ." Kim was only linked to the scene of the body find, and by two pieces of evidence: tire casts made on the farm lane about 100 feet toward Sylvan Dell Road and boot casts made at the 127½ feet location. Therefore, if the Gleckner/Miller location of 27-30 feet is correct, the cast evidence was fabricated because the defendant would not have gone beyond 30 feet on the farm lane, and therefore his tires and boots could not have made those impressions *in the cornfield.*

C. TIRE CASTS

Kim Lee Hubbard was convicted on the basis of plaster of paris casts made of tire impressions said to be left by his car on October 19 in mud on the farm lane about 30 feet from Sylvan Dell Road. Specifically, Cast No. 91 was linked to Tire

No. 87, the left rear tire and it showed six good treads. The tire casts made in the cornfield additionally tied Kim to the scene of the body's discovery. That the tire casts were actually poured on the farm lane is contestable by several evidentiary discrepancies. (Portions of this section were excerpted from Attorney Dick Watt's PCHA petition.)

First, Commonwealth Photo No. 10 shows a piece of mud said to be located in the lane about 100 feet toward Sylvan Dell Road from the location where the body of the victim was found. Cast No. 91 was taken from the mud depicted in Photo No. 10, according to the prosecution, and the mud print was made by the left rear tire of Kim's car, Tire No. 87. However, the mud shown in Photo No. 10 simply does not match Cast No. 91. Therefore, it is highly unlikely that Kim's left rear tire made the mud print shown in Photo No. 10.

Second, the left front tire of Kim's car had a flat on October 29. Mr. Faust of Poole's Sunoco put a new tire on the car the same day. His car was impounded on October 31. That new tire was marked as Commonwealth Exhibit No. 89 and alleged by the prosecution to have made the mud print depicted in Photo No. 9 and the Tire Cast No. 92 (right front). Keeping in mind that the tire casts were poured on October 28 and said to be impressions made by Kim's car on October 19, the date of the murder; the prosecution's official evidence then included a tire which was not even on the car until October 29 — ten days after the murder. The only logical conclusion to be drawn is that Tire Cast No. 93 was fabricated.

Third, Photo No. 9 shows one piece of mud on the lane containing two tire prints, adjoining, and said to be made by the right front and right rear tires of Kim's car. Photo No. 21, in turn, depicts two plaster of paris casts poured in that same piece of mud. Those tire casts were marked as exhibits Nos. 92 and 94. However, there is a major discrepancy between Photos Nos. 21 and 9, both of which purport to show tire prints. Photo No. 21 depicts two separate casts with vegetation between them; Photo No. 9 depicts one piece of mud containing two parallel tire prints and no vegetation. If Photo No. 21 is a photo of the tire prints shown in Photo No. 9, there should be no vegetation between the casts. In fact, Photo No. 21 does

not show plaster of paris casts of the tire prints shown in Photo No. 9 per the Commonwealth's contention.

Fourth, Tire Cast No. 94 was entered into evidence by the prosecution as having been made by the right rear tire of Kim's car in the farm lane. This tire cast clearly contains the imprint "ELD" from the trademark "Kelly-Springfield" on the side of the tire. According to several police experts; the tire of a moving vehicle cannot leave an impression of the tire's trademark. Moreover, the tire must be off its rim in order to make even a stationary impression of the trademark. Kim's right rear tire, alleged to be moving through the farm lane, could not have made the tire impression of Tire Cast No. 94, which contains the letters "ELD" of the tire trademark, because a moving vehicle cannot leave a trademark impression.

There is evidence to suggest that some or all of the tire casts were possibly fabricated at the South Williamsport Borough Hall, where Kim's car was impounded on October 31. Several photos of the car jacked up show a white, chalky substance on the garage floor as well as white tire tracks. Paul Stiner, in an affidavit before the trial, alleged that he saw plaster of paris prints at the Borough Hall the day after Kim's car was impounded. Alan Ertel, in a January 14, 1974 letter to Judge Greevy, insisted that Stiner was mistaken and had, in fact, seen a cleaning compound on the floor. Finally, a Joe Hubbard affidavit of April 25, 1980 refers to statements made by Captian Ross of the South Williamsport Police Department in front of himself, his wife, Charles Fitzgerald and Dwight Schmuck. Ross allegelly said that the State Police ran the new tire (Tire Cast No. 92) through a trough filled with plaster of paris on October 31, while the car was impounded at Borough Hall.

Furthermore, the tire evidence may have been tampered with prior to an evidentiary hearing before Judge Greevy during the summer of 1974. The four tires on Kim's car in October 1973, prior to October 29, were very bald. Mr. Faust stated they would not pass inspection. Indeed, Jack Felix and Kim's parents viewed the tires and other evidence at the State Police Barracks in Montoursville prior to the hearing. Felix, in an

affidavit of August 13, 1975 stated: "Tires which I recall as being marked Commonwealth's Exhibit 87 and 88 were two tires on rims with not very discernible treads visible and both appeared to show effects of wear to the 'outside' ". At the hearing, Ertel claimed he was not aware the tires were to be physically produced. The State Police brought them from Montoursville causing a one-hour delay. When exhibited, the tires were apparently not the same as those viewed earlier. According to Felix, "Tires which were brought into the Court Room bearing identification labels as Commonwealth's Exhibit 87 and 88 appeared to be recapped tires and there was some mud visible on the rims. One of these tires contained six fairly 'good treads' ". By his own account, Felix was shaken by the apparent tampering of evidence, had to sit down and made no challenge. The original four tires were very bald, with no discernible treads. Yet a photo provided Felix by Judge Greevy earlier showed six good treads. And Ertel at the hearing displayed the first tire produced by the State Police and, without being asked, proclaimed that it had six good treads.

In addition, Felix had in his office, by permission of Judge Greevy, Exhibit No. 110 — a poster with six photos, red lettering and red pin-striping going from photo to photo. When produced at the hearing, No. 110 had only four photos and no pin-striping according to Charles King. Felix stated: "Photo 110, which had been examined at length in my office, purported to be a photo of a cast showing certain visible tread grooves within it, and used red colored guidelines. But this 'same' photo when referred to in the subsequent Oral Argument showed different color guidelines."

The discrepancies surrounding the tire evidence do not prove the innocence of Kim Lee Hubbard. However, Kim was linked to the scene of the body discovery in large measure by the tire casts, and this nexus resulted in his conviction. Given the serious charges relative to the tire evidence, we are able to conclude that a reasonable doubt is raised as to whether Kim's car was ever in the cornfield's farm lane. And absent the tire evidence, a conviction most likely would not have been obtained by the prosecution.

D. BOOT CASTS

Kim Lee Hubbard was convicted on the basis of a plaster of paris cast of impressions said to be left by his boots on Octoter 19 in the mud under the victim's body at the 127½ feet location. Specifically, his Left Boot (marked as Commonwealth Exhibit No. 97) allegedly made both prints contained in Cast No. 51. Attorney Peter Campana regards this cast as the most damaging piece of evidence against Kim.

Commonwealth Photos Nos. 11 and 15 show heel prints in mud that the prosecution said were made by Kim's boots. These heel prints are 9 inches apart. Commonwealth Photo No. 20 depicts plaster of paris casts poured at the body find. At the trial prosecution argued that the lower cast in Photo No. 20 was Cast No. 51, which contained the heel prints shown in Photos Nos. 11 and 15. However, Cast No. 51 clearly shows that the two heel prints are almost touching rather than 9 inches apart. The only conclusion to be reached is that Cast No. 51 is not a cast of the heel prints shown in Photos Nos. 11 and 15, which were taken at the 127½ feet scene of the victim's body.

Further, Cast No. 51 was said to have been made from under the victim's body. At 4:30 to 4:45 p.m. on October 19, a heavy rain began to fall on the cornfield. The dirt in the cornfield quickly turned to mud. The body likewise became wet and covered with mud. And the autopsy photos and report indicate that the victim's entire backside, including the buttocks said to be directly over the two heel prints in Cast No. 51, was coated with (by then dried) mud.

Many, including Peter Campana, believe it was impossible to obtain a boot print from under a body whose back was covered with mud. Alan Ertel, in his summation (p.7), contended that the boot prints in fact were protected from the rain by the body. And this despite the pathologist's account that the body itself was coated with mud.

Cast No. 51 of Kim's left boot, said to be made from under the victim's body at the 127½ feet location, linked him to the scene of the body find and probably was the most damaging piece of evidence overall. The serious discrepancies sur-

rounding the boot cast evidence, like those of the tire casts, do not prove the innocence of Kim. But again, without it, the Commonwealth's already highly-circumstantial case would have been non-existent.

E. CLOTHING

There are numerous discrepancies relative to the victim's clothing, together with the condition and location of the body, suggesting that the body itself was tampered with.

Jennifer Hill wore a blue long-sleeve jersey (Exhibit No. 67) with the number 33 in gold on October 19. Body Photos Nos. 4, 5, and 6 clearly show a jersey matching that description on the victim when found in the cornfield on October 28. Prior to the evidentiary hearing in the summer of 1974, Jack Felix and Kim's parents examined the jersey at the State Police Barracks in Montoursville. According to Felix, "the blue jersey which was removed from a clear plastic bag smelled both musty and sour." Joe Hubbard added that dried mud and a vomit stain were on the jersey. At the evidentiary hearing, "the jersey which was removed and displayed to the Court appeared much more damp than it had at the State Police Barracks," by Felix's account. Joe Hubbard believed it had been washed. A photo of the jersey shows short — rather than long-sleeves. When Dr. Catherman was shown that photo and asked to compare it to his autopsy photos, he allegedly stated that they were different jerseys. Therefore, the jersey introduced into evidence was not the jersey on the body of the victim when found on October 28 as shown by photos nos. 4, 5, and 6. Coroner Miller testified that the victim's body was found with one arm in a coat. Dr. Catherman's report noted that no coat was on the body at the time of the autopsy. According to Dorisann Hubbard, Police Chief Smith visited daily during the 9-day disappearance, repeatedly making statements such as "Dorisann, please say that you made Kim take Jennie's coat after her," "Dorisann, you just don't remember because all of the upset, you did make Kim take Jennie home."

Jennifer wore dark blue jeans with red hearts on the knees and red cuffs on October 19. That afternoon she tore

the crotch in a kickball game. On October 28 her body was found with light blue jeans (additionally meaning that the victim also changed her pants during the 15-20 minute critical timeframe of 4:30 p.m. to 4:45 or 4:50 p.m.) At trial and the evidentiary hearing, the dark blue jeans showed machine-stitched white threads along the torn seam. Later, this stitching was partly removed. According to Felix, the dark blue jeans "had been partly sewn in the area of the crotch with white thread or string with a couple strands hanging loose." The Hubbard's had no sewing machine; the Hill's did. Jennifer's dark blue jeans were sewn at or after the time the Commonwealth contended that Kim killed Jennifer and Kim did not do the stitching.

Finally, and most important of all, Chief Autopsy Technician Floyd Coles asserted that: "although the victim was photographed with her bra off at the scene, the bra is back on the body in its appropriate place when the pathologist is examining. This implies strongly that there was tampering of the body between the time of discovery and the time the body was examined by the pathologist. Because of this, any statement relative to the condition of the clothing is suspect."

We are able to conclude that there is much evidence to suggest that the clothing and body was tampered with between the date of disappearance on October 19 and the date of body discovery on October 28, as well as between the latter date and the date of autopsy on October 29. That impact on the culpability of Kim is inconclusive.

F. OTHER ISSUES

1. The Hubbard's contend that Jennifer Hill arrived at her home about 4 p.m. on October 19, five minutes after she was seen by Joe Mendez less than one block from home; that she died at home as the result of domestic violence; and that at 5:35 p.m. Jack and Norma Hill, her parents, went out walking and were acting "odd". Jennifer did not want to go home that day; she had to clean her dresser drawers and her parents would not let her go to the football game. Jennifer had torn her good jeans, which she was not supposed to have worn that

day; the Hill's had a sewing machine upstairs. At 6 p.m. Norma reported Jennifer missing to Captain Ross and, in her description, stated that Jennifer was wearing dark blue jeans. The unanswerable question is: how did Norma know which pants Jennifer had worn if she had not seen her that day? If anything, Norma would have reported her wearing the light blue jeans which was Jennifer's change of clothing for the day. Finally, three factors point to Jennifer's death at home. First, while Dorisann Hubbard was at the Hill house keeping vigil on October 23 or 24, Garth Hill, seven years old and sister of the victim, allegedly said to her "Well, we know where she is, she's dead and dumped you know where." Norma glared at Garth. Second, after Jennifer's burial, Jack Hill drove Dorisann home and, in reference to sympathy donations, allegedly told her, "I'll tell you, Dorisann, this is the first time in my life that I've been out of debt." Third, at 3 a.m. on October 20, Mrs. Maggs, Jennifer's grandmother and in whose home the Hill family lived, called the Hubbard's crying hysterically and said she knew Jennifer had been killed.

2. On October 25 at 1:40 a.m., Mr. Pfirman, an administrator at Williamsport Hospital, and Bob Shoalts came to the Hubbard home in a drunken condition. For over two hours Pfirman accused Kim of murdering Jennifer — even though her body had not been found. Pfirman allegedly said, "We know what happened to Jennifer Hill. Are you going to tell us about it?"

3. The evening of October 19 Captian Ross came to the Hubbard home and told them about a man he found with a razor blade cut, bleeding in a sink, who said he knew the Hubbard's. Later, Kim, Dorisann Hubbard and Colleen Whitenight drove to the house where they thought he lived. They did not find him.

4. State Trooper Houser testified that he received four tire casts from Trooper Keppick on October 30 and transferred them along with the tires to the State Police Crime Laboratory in Harrisburg on November 1. However, Trooper Krebs of the Crime Lab testified: "I received two on the lst of November and two on the 5th of November." The point is this:

no tire casts were transported to Harrisburg until after Kim's car was impounded on October 31.

5. Mr. Bittle of the Bureau of Waste Water, Department of Environmental Resources, testified that he drove a 1973 International Scout on the farm lane in the cornfield the afternoon of October 19, and thus accounted for additional tire prints on the lane He wanted to make a sketch of the area relating to an oil-seepage investigation against ARCO. However, DER records obtained earlier this year show that Bittle, in fact, was in the cornfield on July 24/25, 1973 and that he filed a sketch initialed and dated July 25. There is no official record of Bittle in the cornfield on October 19 or of his having a need to be there.

6. Attorney Jack Felix, while handling Kim's appeal; was sued by "Trooper Barto, the affiant, and other troopers on the ground that Felix was interfering with their police duties. In a landmark case, *Barto et al. v. Felix*, (378 A.2d 927, 250 Pa.Super. 262, 1977); the Pennsylvania Supreme Court ruled that a public defender was not entitled to absolute immunity. After four years, the State FOP dropped the case.

V. CONCLUSION

After an exhaustive study of *Commonwealth of Pennsylvania vs. Kim Lee Hubbard*, which included an analysis of evidence compiled by Joseph Hubbard, father of Kim, readings of the main trial transcripts, appellate briefs and court opinions, interviews with all three appellate counsels and others, and a field trip to South Williamsport, we arrive at the following conclusion: the Hubbard's assertion of a strong pattern of prosecutorial manipulation and/or tampering of evidence in this case has highly significant merit, but the impact of that pattern on the culpability of Kim Lee Hubbard is inconclusive. We do not have clear and convincing evidence to prove the innocence of Kim Lee Hubbard relative to the charge of murder in the second degree of which he was convicted on March 1, 1974, recognizing the extraordinarily high standard of proof needed. However, at the same time and without contradiction, gross inconsistencies in evidence presented by the prosecution cast a reasonable doubt on the question of Kim Lee Hubbard's guilt.

We recommend that the Hubbard's aim of clearing the name of their son is best served at present by extralegal means, namely, further investigation. Their legal recourse has been virtually exhausted, and it is our professional opinion that the Hubbard's can currently expect no positive result from a criminal justice system which has served them so poorly in the past. Accordingly, their resources are most usefully directed toward additional investigation.